Compendium of Grievance Arbitration Decisions 1982

Department of
Labour and Manpower
Research Division

COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS
1982

NOVA SCOTIA DEPARTMENT OF LABOUR AND MANPOWER
RESEARCH DIVISION

HONOURABLE JACK A. MACISAAC
MINISTER

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FOREWARD

This publication is the fourth summary of grievance arbitration decisions (awards) produced by the Nova Scotia Department of Labour and Manpower. The decisions listed are those which have been filed in accordance with amendments to the Trade Union Act effective May 1978. On occasion summaries of arbitrations outside the jurisdiction of Nova Scotia have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Nova Scotia Trade Union Act and have been included as a matter of general interest. Subsequent to this date, summaries of grievance arbitration decisions have been prepared and released in the publication Monthly Summary of Activities, Industrial Relations Division, Labour Relations Board. Further arbitration awards received by the department will continue to appear in the above publication.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not necessarily get filed with the Nova Scotia Department of Labour and Manpower. Results of appealed decisions are received on an ad hoc basis and are reported as they arrive.

Part 1 of this publication lists grievance arbitration awards by decision number. All indices are retrospective to include the years 1978 through 1982. For summaries of decisions previous to 1982 it is necessary to refer to the appropriate issue for that year. Indexation of arbitration awards is based on Canadian Labour Arbitration by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 1977).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour and Manpower, Research Division, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424-4313).

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Halifax, Nova Scotia
1983

PART 1

LISTING OF GRIEVANCE ARBITRATION DECISIONS, 1982

DECISION: 82-01

Lord Nelson Hotel Limited AND Hotel and Restaurant Employees and Bartenders Union, Local 662

Judge J. A. MacLellan, Chairman; Gregory North and Gerald Jollymore

Gerald McConnell, for the union
Eric Durnford, for the employer
January 21, 1982

ISSUE: Demotion - Refusal to Obey Instructions 7:3610

CIRCUMSTANCES: The grievor, who had a long and unblemished work record with the Employer, was demoted from assistant housekeeper to maid after a blow-up between her and her immediate superior. The blow-up occured while the grievor was being questioned about an alleged infraction regarding guest comment cards. Evidence disclosed a history of personal clashes between the grievor and the executive housekeeper.

AWARD: The grievance was allowed. The Arbitration Board ordered the grievor to be reinstated in her former position for a period of six months, while the parties ascertain whether a suitable working relationship can be fostered. The Board retained jurisdiction.

DECISION: 82-02

George L. Mitchell Contractors Limited AND International Brotherhood of Electrical Workers, Local 625

Bruce Outhouse, Arbitrator

Fern Tardif, for the union
W. L. MacInnis, for the employer
January 12, 1982

ISSUE: Remittance of Union Deductions 9:1200

CIRCUMSTANCES: The Union filed a policy grievance, claiming that the Employer was not remitting to the union a deduction for the Union Recreation Fund, as required by the Collective Agreement.

The Employer, in response, noted that the remittance was dependent upon a written authorization from an employee. The Employer had received no written authorization from any of his employees, and argued, as a consequence, that he was under no obligation to do so.

AWARD: The grievance fails. The Arbitrator, after examining the wording of the Collective Agreement, accepted the Employer argument about the necessity of prior written authorization. While the Arbitrator conceded that this funding was somewhat out of harmony with the prevailing practice between the Union and the Employers Association, there was nothing to prevent the Employer from insisting upon adherence to the Collective Agreement.

DECISION: 82-03

Dalhousie University AND International Union of Operating Engineers, Local 968

Bruce Outhouse, Arbitrator

Edgar Doull, for the union
Eric Durnford, for the employer
January 25, 1982

ISSUE: Leave of Absence 7:3120

CIRCUMSTANCES: The grievor, a Stationary Engineer, requested a special leave with pay, in order to look after his young daughter while his wife was in hospital giving birth to a second child. The employer was prepared to allow one paid working day as paternity leave, but if any additional time was required, this would be taken from vacation time.

AWARD: The grievance fails. The Arbitrator considered each of the Union's three agruments, and rejected them in turn. He just noted that the Collective Agreement left the Employer with a broad discretion to consider and, if necessary reject an employee's request for leave. There was no evidence that the Employer acted unfairly or arbitratarily in denying the grievor's request. The Arbitrator, in addition, doubted that he had the authority to impose standards of fairness upon the Employer in matters where its discretion was not circumscribed by the terms of the Collective Agreement.

The Arbitrator also denied the Union's agrument that the grievor was discriminated against by the Employer. No evidence was presented to him to suggest discrimination.

Thirdly, the Arbitrator did not accept the Union's contention that past practice revealed examples where the employer had granted longer paid leaves. Past practice may be used in situations where the Collective Agreement is ambigious, or as a defence to promissory estoppel; however, it cannot, under any circumstances, be raised as a valid assertion of positive rights.

AUTHORITIES: Re Metropolitan Toronto Board of Commissioners of Police (1981), 124 DLR (3d) 685 (Ont G.A.)

DECISION: 82-04

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Association

Innis Christie, Arbitrator

Ronald Pink, for the union
Reinhold Endres, for the employer
January 22, 1982

DECISION: 82-04 (CONT'D)

ISSUE: Compensation for Accumulation Overtime after Employment Terminated 8:2100; Propriety of the Grievance 2:3110

CIRCUMSTANCES: The grievor, an assessor employed by the Commission, had built up a considerable credit for overtime hours by the time he resigned his position. The Collective Agreement between the parties did not give the grievor entitlement to overtime pay, but rather, to time off with pay, calculated at a straight time rate.

Two issues arose. Firstly, the Employer argued that the grievor was not entitled to grieve, since the grievor had resigned, and his resignation had been accepted, prior to the filing of the grievance. Hence, according to the Employer, he was no longer an employee within the meaning of the Collective Agreement.

Secondly, if he was entitled to grieve, the Employer contended that he was not entitled to compensation for overtime, since he had dated and submitted his letter of resignation prior to realizing that he had not allowed for the discharge of his overtime entitlement.

AWARD: The grievance succeeds. On the first issue, the Arbitrator followed prior arbitial jurispurdence in ruling that the right of a grievor arises out of a contract and cannot be lost merely by cessation of employment. To deny a former employee who has accrued rights to unpaid pay during his employment under a valid collective agreement - provided the necessary time limits are met and the grievance has the requisite union support - is contrary to the normal expectations of all parties to a collective agreement. An analogy was drawn with the right of a wrongfully dismissed employee to grievance, with the arbitrator unable to distinguish such an example from the position of an employee who has resigned.

On the second issue, the Arbitrator noted that while the "issue of when the employee's entitlement was to be made good was within the realm of management rights, the employer - by defination of the very word 'entitled' - has an obligation to ensure that an employee who had built up an entitlement to time off in lieu of overtime pay does get his proper compensation. Hence, the employer, when he denied the grievor's entitlement, was in breach of the collective agreement.

The Arbitrator noted that while he cannot, under the Collective Agreement, order the Employer to pay either overtime pay or award specific performance, he does have the power to award damages. To not do so would be to allow the Employer to be unjustly enriched.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, p. 72; Palmer, Collective Agreement Arbitration in Canada, p. 140; Re Ford Motor Co. of Canada Ltd, (1952), 4 L.A.C. 1218; General Motors of Canada v. Brunet and UAW, Local 1163, (1977), 2 S.C.R. 537; Downey v. Scotia Square Hotel Ltd. (1975), 55 D.L.R. (3d) 300; Caines v. Cape Breton Development Corp. (1973), 39 D.L.R. (3d) 606; Re Genstar Chemical Ltd., (1978) 2 C.L.R.B.R. 558; Re Cyaniorid of Canada Ltd. (1969), 20 L.A.C. 111; City of Kelowna and CUPE, Local 338 (1975; B.C. unreported); Re Northern Electric Co. Ltd. (1969), 21 L.A.C. 53; Polymer Corporation Ltd. v.

DECISION: 82-04 (CONT'D)

O.C.A.W., Local 16-14 (1962) SCR 338; Deglman v. Guaranty Trust Co. of Canada and Constantincais, (1954) 3 DLR 785; Fibroas, (1943) AC 32; Preeper v. Preeper (1978), 27 NSR (3d) 699; Nicholson v. St. Donis (1976), 57 DLR (3d) 699; Mardon v. Dalhousie College and University (1980), 37 NSR (2d) 434

DECISION: 82-05

Cape Breton Hospital AND Canadian Union of Public Employees, Local 753

R. Lorne MacDougall, Q.C., Chairman; Donald McDougall and Linda Gallant

Barry Stevens, for the union
Eric Durnford, for the employer
January 6, 1982

ISSUE: Innocent Absenteeism 7:3210; Onus for Just Cause for Termination 7:3250

CIRCUMSTANCES: The grievor, a general worker in the Food Service Department of the Hospital, was terminated by the Employer. After a period of repeated but innocent absenteeism, the Employer requested the grievor to attend a medical examination at the doctor of their choice. The grievor attended the examination, but refused to sign a release to have the medical report sent to the Employer before it was first sent to her family doctor. The grievor was fired shortly afterwards.

AWARD: The grievance succeeds. The majority of the Arbitration Board first considered the prior arbitral caselaw on absenteeism and held that to justify the discharge, the employer must establish two pre-conditions. (i) undue absenteeism in the grievor's past record and, (ii) That the grievor is incapable of regular attendence in the future.

While the Employer established the excessive absenteeism on the face of the grievor's record, the hospital did not, in the circumstances, exhaust all available means to show that the grievor would not be physically fit to perform her assigned duties in the future.

The grievor was awarded back her job, with no loss of seniority, but without compensation. However, a condition of her re-employment was that for the first six months following her return to work, her record of absenteeism must not exceed the 1980 average for Dietary Personnel.

DISSENT: One Board member dissented. He noted recent Nova Scotia arbitration jurispurdence which held that once the absentee record has been established by the Employer, the onus at the point shifts to the grievor to establish that there is substantial evidence regarding the grievor's future employment reliabity. The dissenting Board member would have dismissed the grievance.

AUTHORITIES: Re Massery Ferguson Ltd. (1969), 20 L.A.C. 370; Re Nova Scotia Government Employees Association (February 1979; unreported Nova Scotia Decision;

DECISION: 82-05 (CONT'D)

Clarke); Palmer - Collective Agreement Arbitration in Canada p. 331; Brown and Beatty - Canadian Labour Arbitration p. 310; Young - At the Point of Discharge p. 126-7

DECISION: 82-06

International Union of Bricklayers and Allied Craftsmen AND Buchanan Masonry Limited

Brian Langille, Arbitrator

Ronald A. Pink, for the union
Gregory North, for the employer
April 20, 1982

ISSUE: Preliminary Objection 3:2100; Jurisdiction of the Arbitrator 2:0000; The Collective Agreement 2:1200

CIRCUMSTANCES: The union grieved the failure of the employer to pay to the welfare, promotion and pension funds, and to deduct union dues. The employer raised two preliminary objections.

The employer claimed firstly that there was no valid voluntary recognition agreement. The union disputed the jurisdiction of the arbitrator to decide this issue, contending that it was a matter for the Labour Relations Board. The parties had signed a letter agreeing to be bound by the Collective Agreement between the union and the accredited Employer's Organization, but the letter of agreement did not expressly define the unit or expressly acknowledge the exclusivity of the bargaining agent. The Collective Agreement referred to did, however, make these points explicitly. Both the Letter of Agreement and the Collective Agreement were filed with the Minister.

The Employer's second preliminary objection was the the Collective Agreement between the union and the Accredited Employers' Organization only applied, by its express terms, to members of the Organization; Buchanan Masonry was not a member.

The issued of substance was whether the Collective Agreement applied to residential work.

AWARD: The grievance succeeds. The arbitrator does have jurisdiction to determine whether there is a valid voluntary recognition agreement, and finds that there is. The letter of agreement implicitly confers exclusivity for a specific unit, and it does so expressly by incorporating the Collective Agreement by reference. Buchanan Masonry is bound by the Collective Agreement with the Employer's Organization, despite ambiguity of its wording, by virtue of the Act which binds non-members. The Act makes the agreement binding for commercial work only, so that Buchanan could contract out of the agreement in respect of residential work. However, Buchanan did not so contract out, and the agreement by its terms includes residential work.

DECISION: 82-07

The Maritime Employers Association **AND** International Longshoremen's Association, Local 1825

R. Lorne MacDougall, Q. C., Arbitrator

David Bright, for the union
George MacDonald, for the employer
April 26, 1982

ISSUE: Application of Seniority 6:2000; Lay-Off 6:2200; Senior Employee with the Required Ability 6:3210

CIRCUMSTANCES: The union grieved that the grievors had been laid-off out of seniority. The Collective Agreement provided that the more senior employee would be retained if able and willing to perform the work. The grievors were mechanics. Prior to 1979 there were no industrial mechanics, and certain work had to be contracted out. In 1979, the employer hired two industrial mechanics who could perform more tasks than mechanics, with the result that the work no longer had to be contracted out. When lay-offs became necessary, the two industrial mechanics were retained, and more senior mechanics laid-off.

AWARD: The grievance is dismissed. On the whole of the evidence the grievors did not have the ability to perform the work that the industrial mechanics could perform. The employer's decision was not arbitrary, discriminatory or unreasonable.

DECISION: 82-08

City of Dartmouth **AND** International Association of Firefighters, Local 1398

Brian Langille, Arbitrator

Ron Joyce, for the union
Michael Morash, for the employer
March 7, 1982

ISSUE: Preliminary Objection 3:2100; The Collective Agreement 2:1200

CIRCUMSTANCES: The union grieved the breach of a certain rule and regulation made pursuant to Dartmouth City By-Law C-15. The Collective Agreement made explicit reference to By-Law C-15, but not to rules and regulations made under it. Furthermore, the employer claimed that the reference in the Collective Agreement to By-Law C-15 was a limited one, not including the portion of By-Law C-15 relied upon by the union. The employer raised a preliminary objection that the rule and regulation grieved was not part of the Collective Agreement, and the matter was therefore not arbitrable.

AWARD: The preliminary objection succeeds and the grievance is dismissed. The regulation grieved is not part of the Collective Agreement; the incorporation of By-Law C-15 is a limited one not covering the present circumstances. In any event, the incorporation of By-Law C-15 would probably not be sufficient to incorporate rules and regulations made under the By-Law.

DECISION: 82-09

The Canadian Rock Salt Company **AND** Energy and Chemical Workers Union, Local 823

D. Merlin Nunn, Q.C., Chairman; D. B. Eddy and George Morrison

Randy Bonnyman, for the union
Douglas Lockhart, for the employer
February 25, 1982

ISSUE: Scheduling Work 5:3000

CIRCUMSTANCES: The company posted a new shift schedule, which also dealt with overtime and classifications. Because of a change in market conditions, the company decided not to proceed with the new schedule. The union nonetheless sought a declaration that the company did not have the right under the Collective Agreement to unilaterally implement this schedule.

AWARD: The grievance succeeds. The union is given the declaration sought. The new schedule is inconsistent with specific provisions in the Collective Agreement concerning overtime, classifications, and shift assignment.

DECISION: 82-10

Canadian Rock Salt Company Limited **AND** Energy and Chemical Workers Union, Local 823

D. Merlin Nunn, Q.C., Chairman; D. B. Eddy and George Morrison

John Kane, for the union
R. B. MacDonald, Q. C., for the employer
February 24, 1982

ISSUE: Premium Rates of Pay 8:2200; Defination of word "on"

CIRCUMSTANCES: The grievor, a maintenance journeyman and an occasional high pressure welder, performed some welding duties on a boiler valve at the employer's plant. The Collective Agreement states that a premium of $0.35 an hour will be paid to welders "... working on or in Fine Salt Plant Boilers". The grievor testified that he had to sit on the boiler to perform the welding of the valve, which was the first valve coming out of the boiler. The employer presented evidence that the grievor had worked previously on the same valve, and had not claimed an extra premium.

AWARD: The grievance fails. A majority of the Arbitration Board held that the word "on" refers to working on the boiler itself, and not to a situation where one was merely sitting on the boiler and working at something else. The Board majority rejected the union argument that since the valve in question was the first valve off the boiler, it should be construed as part of the boiler.

DECISION: 82-10 (CONT'D)

DISSENT: One of the Board members dissented, holding that the limits of the Boiler should be up to the first welded valve out of the shell of the Boiler, since without this valve, the Boiler cannot be operated. The valve, which was only a foot away from the Boiler, was as much a necessary part of it, as a tire is to a car.

Another Board member dissented in part. He held that the Chairman improperly reversed the burden of proof, contrary to the accepted principle as stated in Brown and Beatty, p. 208.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, p. 208

DECISION: 82-11

Brookfield Foods Ltd. **AND** Canadian Brotherhood of Railway, Transport and General Workers, Local 503

R. Lorne MacDougall, Arbitrator

George Boudreau, for the union
Robert Mingo, for the employer
April 30, 1982

ISSUE: Holiday Pay 8:3100; Performing Work on a Statutory Holiday 8:3130

CIRCUMSTANCES: The grievor, a milk striker and salaried employee, worked on Thanksgiving Day. He was paid a regular day's salary plus an additional one-half day's pay. The company's normal practice (which was later offered to the grievor) was to pay a regular day's pay plus an additional day's pay, relying on Article 8(c) of the Collective Agreement. "If work is performed on such days, the employee will be paid his straight time rate of pay for the day, plus additional straight time rate of payment for all hours worked ..." The union claimed the grievor was entitled to his regular pay plus an additional one and one half day's pay, relying on Article 15(g) "For work on a sixth day or holiday milk strikers will be paid one and one half time the rate shown in Appendix "A".

AWARD: The grievance succeeds. The grievor is entitled to his regular pay plus an additional one and one half day's pay pursuant to Article 15(g). Article 8(c) applies to hourly paid employees, not salaried employees. Article 15(g) equates holiday work with overtime, and provides for additional remuneration.

DECISION: 82-12

Minas Basin Pulp & Paper Co. Ltd., **AND** Local 583 of the Canadian Paperworkers Union

Judge J. A. MacLellan, Chairman; Eric Durnford, Rene Quigley

DECISION: 82-12 (CONT'D)

Donald McDougall, for the employer
D. G. Grant, for the union
April 15, 1982

ISSUE: Operation of Collective Agreements - Retroactivity 4:1610; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100

CIRCUMSTANCES: Four working days prior to leaving the Company to take employment with another company, the grievor submitted a receipt for a pair of work boots, asking for reimbursement. The Company reimbursed him for 1/3 of the cost of the boots since he had worked 1/3 of the year. The grievor admitted to purchasing new boots because they were required in his new job.

After the grievor left the employ of the Company, a new Collective Agreement was signed in which the Company agreed to "contribute $25.00 towards the cost of safety footwear to each employee purchasing such footwear in any one year". The Company argued that this did not apply to the grievor who was no longer in its employ at the time the Agreement was signed although it had been paying the new wage scale prior to the signing of the agreement.

AWARD: The Board agreed that in cases other than the computation of wages, other retroactive benefits are not available to employees who were not in the bargaining unit at the time the Collective Agreement was signed. Therefore the grievance failed.

However, the Board suggested that the parties re-negotiate the relevant clause since its loose wording could lead to situations neither party intended.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 155.

DECISION: 82-13

United Steelworkers of America, Local 1231 AND Hawker Siddeley Canada Inc.
Trenton Works Division

S. Bruce Outhouse, Arbitrator

Robert Young, for the union
John Howatson, for the employer
March 26, 1982

ISSUE: Promotion and Lay-off Procedures - Bumping 6:2330; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100

CIRCUMSTANCES: The grievor was laid-off from his job as a millwright as part of a general reduction in the Employer's work force. He sought to bump a less senior employee employed as an automotive repairman in the millwright's department. This procedure was allowed for in the Collective Agreement, providing the Employer felt the employee was qualified for the position being sought. The Employer denied

DECISION: 82-13 (CONT'D)

the grievor the position on the basis that he was not qualified.

The grievor had been employed at various times in automotive mechanics, working primarily with gasoline engines. The job he sought required extensive work on diesel engines , which witnesses maintained would require specialized training. The Union pointed out that the job description did not mention work with diesel engines and that the job description should be the basis for determining suitability. The Employer maintained that the job as actually performed was the consideration.

AWARD: The grievance fails. The Arbitrator determined that "the work required" under the relevant Articles in determining suitability meant the work performed on the job and not the work described in the job description. Because the grievor was not qualified to perform those duties, he could not bump the other employee.

DECISION: 82-14

Enheat Limited AND United Steel Workers of America, Local 4883

R. Lorne MacDougall, Q.C., Arbitrator

Robert Young, for the union
Harvey Morrison, for the employer
April 12, 1982

ISSUE: Layoffs and Bumping 6:2330

CIRCUMSTANCES: This is a policy grievance by the union. The employer, a manufacturer of aircraft parts, laid-off a number of its employees, including a number of fitters in the plant's Bonding division. The employer had employed fitters in both its Bonding and its Final Assembling divisions, and the laid-off fitters claimed that they had greater seniority than some of the Final Assembling fitters who were not laid-off. Hence, they claimed their right to bump.

The employer argued that employees when hired as fitters are hired either for final assembling or bonding, and not for either or both. The work process in each division is quite distinct and any transfer of fitters from one division to another would require some degree of re-training, which the employer argued, it had no obligation to provide.

In response, the union argued that the description for Final Assembling fitters and Bonding fitters was identical and therefore, they have the right to bump in a lay-off situation.

AWARD: The grievance fails. The Arbitrator adopted the long-accepted arbitial principle that where bumbing rights are claimed, there must be a functional relation or a similarity of the skills or operations involved in performance. He also held that to require an employer to provide re-training for senior employees

DECISION: 82-14 (CONT'D)

who have been laid-off, there must be very clear language to that effect in the collective agreement. The Arbitrator held that despite the similarity in job description, the actual content of the jobs in each division are in fact uniquely different. Hence, there is no "functional relationships" and bumping rights do not apply.

AUTHORITIES: Re Canadian General Electric Co. Ltd. (1949), 1 L.A.C. 229; Re Canadian General Electric Co. Ltd. (1940), 1 L.A.C. 480; Re Reynolds Aluminum Co. of Canada (1980), 26 L.A.C. (2d) 266.

DECISION: 82-15

City of Halifax AND International Association of Fire Fighters, Local 268

S. Bruce Outhouse, Arbitrator

Wylie Spicer and Brian Johnson, for the union
Barry Allen, for the employer
March 31, 1982

ISSUE: Discharge of a Probationary Employee 7:5020

CIRCUMSTANCES: The grievor, a probationary fireman, was dismissed by the employer for unsatisfactory performance. The Arbitrator had decided, in a preliminary decision awarded in March 1981, that the grievor had a right to grieve his dismissal notwithstanding a provision in the collective agreement to the contrary. The award was set aside by the Supreme Court, Trial Division in June 1981, but was restored by the Appeal Division in January, 1982. The present decision heard the merits of the grievance.

The grievor, before being hired on probationary status, was given a number of physical and aptitude tests and performed satisfactorily. After being hired, he underwent a training program, and after successfully completing that, was assigned as a dispatcher. No serious problems in the initial period were noted, although the grievor was observed to be somewhat nervous and lacking in self-confidence. However, over the period of two shifts, the grievor made several errors in receiving calls to the dispatch office, one of them relatively serious. The grievor was returned to a re-training program, where he experienced a number of difficulties in mastering the dispatcher's job. The employer had the grievor examined by a doctor, who suggested that he had possible learning problems. The employer, in light of the medical opinion and the grievor's performance under stress, terminated him.

AWARD: The grievance fails. The Arbitrator adopted a test for the standard to be applied in the dismissal of probationary employees that was just enunciated in Re Porcupine Area Ambulance Service by David Beatty. The test stated that a probationary employee cannot be discharged from his or her employment (in a situation where the collective agreement is silent as to the standard) unless the employer can affirmatively establish the employee's unsuitability as a seniority-rated employee. The employer's assessment of the employee's

DECISION: 82-15 (CONT'D)

unsuitability must be reasonable in both the imposed standard and the arrived-at conclusion; however, the rigour of review by an arbitrator will be less for a probationary employee then for a seniority-rated employee.

Applying this test to the facts before him, the Arbitrator held that there was nothing before him to suggest that the errors committed by the grievor under stress would ease if he was returned to dispatch duty.

AUTHORITIES: International Association of Fire Fighters, Local 268 et al v. City of Halifax (unreported, N.S. Court of Appeal, 1982); Re Advance Machine and Tool Co. (1947), 1 L.A.C. 40; Re Square D. Co. Ltd. (1955), 6 L.A.C. 289; Re Polyner Corp. Ltd. (1964), 15 L.A.C. 345; Re Frontenac Floor and Wall Tile Ltd. (1957), 8 L.A.C. 105; Re Porcupine Area Ambulance Service (1974), 7 L.A.C. (2d) 182

DECISION: 82-16

Elcon Petroleum Maintenance Limited AND Cape Breton Island District Council of Carpenters Trust Fund

William Kelly, Arbitrator
March 22, 1982

ISSUE: Employer Obligation to Pay into Trust Fund; Construction Industry; Legislative Frequency 1:1000, 1:3000

CIRCUMSTANCES: The Trustees grived that the employer failed to make proper remissions into the Trust Fund, as agreed in the Collective Agreement. The company acknowledged its dept.

AWARD: The grievance succeeds. The Arbitrator ordered the Company to remit the funds owing to the trust fund, and allowed the grievor's amendment that the books from an earlier period of time be examined to ascertain whether the Company fully met its obligation, as per the Trust Fund.

DECISION: 82-17

Crossley Karastan Carpet Mills Limited AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

R. Lorne MacDougall, Q.C., Chairman; Kenneth Hennick and D. Arthur Nichols, Q.C.

George Boudreau, for the union
James C. Leefe, Q.C.,, for the employer
March 9, 1982

ISSUE: Failure to Comply with Technical Requiremens of Collective Agreement (Grievor's signature not on grievance); Company Rules (4:1500); Absenteeism Leading to Dismissal 7:3110; 7:3130

DECISION: 82-17 (CONT'D)

CIRCUMSTANCES: The grievor, a Utility man in the Maintenance department, was dismissed by the employer after a mounting absenteeism problem.

The employer raised a preliminary objection. The grievor had not signned the grievance, as required by the Collective Agreement. The employer argued that this nullified the grievance. The union, in response, argued that the requirement for the grievor to sign his grievance is not mandatory, and, alternatively, a grievance should not be defeated on technical grounds, unless the Collective Agreement is explicitly clear on the technical requirements.

On the main issue, the employer led evidence that the grievor had compiled an extremely high absentee record, and that he had on several occasions left work without permission or absented himself from work without first phoning-in as required. The grievor admitted to having a drinking problem, and some personal problems, but the employer argued that the grievor never seriously tackled his problems, despite the employer's willingness to assist and to be patient. The employer also led evidence that the grievor was careless in his maintenance work.

The union argued that the grievor's drinking and personal problems were the cause of his spotty work attendance, but that he had made substantial gains in overcoming these problems, and a lesser penalty should be substituted. The union noted that his employment record, aside from his carelessness and absenteeism, was good, and that other employees with similar problems had received lighter penalties.

AWARD: The grievance fails. The majority of the Arbitration Board first considered the employer's rules of conduct - in particular, regarding absenteeism - and found them to be reasonable and to bind the grievor. The Board then ruled that the grievor had breached the rules through his absenteeism and carelessness and was justly dismissed. It recommended that the Employer, in light of the grievor's youth, othersie good employment record, and efforts at rehabilitation, consider giving him another chance; however, it stressed that the employer was not bound by this recommendation.

On the preliminary objection, the Board majority ruled that for the absence of the grievor's signature on the grievance to nullify the form, there would have to be both a very clear mandatory direction in the Collective Agreement as well as an unequivocal violation of the mandatory provision. Such a violation was not found here. The Board majority also noted that there was no prejudice to the employer, and that the prescribed steps of the grievance process were followed in substance. The preliminary objection failed.

AUTHORITIES: Preliminary Objection: 2 Corpas Juris 449; G. H. Treital - The Law of Contract (4th ed.) p. 486; 1 Halebury (4th ed.) p. 440; Trade Union Act, 1972, S.N.S. c. 19, S. 7; Canadian Union of Public Employees, Local 1047 v. Colchester - East Hants Amalgamated School Board, (1980), 40 NSR (2d) 132 (NSCA). Main Issue: Brown and Beatty, Canadian Labour Arbitration, p. 149; Bruce Young, At the Point of Discharge, p. 222; Re KVP Co. Ltd. (1965), 16 L.A.C. 73.

DECISION: 82-18

Public Service Commission of Halifax AND The Canadian Union of Public Employees, Local 227

Eric DeMont, Q.C., Chairman; James Henley and D. Merlin Nunn, Q.C.

Harold Martell, for the union
R. H. Blois, Q.C., for the employer
February 5, 1982

ISSUE: Assignment of Work Outside the Bargaining Unit 5:1400; Opportunity to Work Overtime 5:3220; Consultation with Union 5:3100

CIRCUMSTANCES: The members of the union local were water meter readers. In April, 1980, a new procdure was introduced by the employer regarding the collection, and recording of meter readings not obtained on a first call to a residence. In mid-1981, there was a substantial rise in the number of 'unread' books containing meter readings, by which a consumer's rate is established. To speed up the billing process, the employer decided that the books should be estimated rather than read, so they were given to the Chief Meter Reader (who is in a separate bargaining unit from the meter readers) who estimated them.

The Union argued that this violated the Collective Agreement in several ways. Firstly, this was an improper transfer of the Union's work to another employee outside the Unit; secondly, the employer failed to consult with the Union when a change of procdure was being implemented; and thirdly, there was a failure to give union members an opportunity to work overtime.

AWARD: The grievance failed. On the first issue, the Arbitration Board found that, on the evidence, the union had never done estimating, hence, there could not be any work that was transferred outside the unit. Consequently, on the second issue, there was no obligation on the employer to consult with the union. And on the third issue, the Board held that the Collective Agreement did not give the union any right to overtime.

DECISION: 82-19

Producers Milk Products AND Teamsters, Chauffeurs, Warehousemen, Local 927

Judge J. A. MacLellan, Arbitrator

Doug Buree, for the union
Deborah Carver, for the employer
March 16, 1982

ISSUE: Culminating Incident 7:4310; Reasonableness of Penalty 7:4300; Employer Discrimination 7:4414

CIRCUMSTANCES: The grievor was dismissed after accidently mixing whey cream in the same tank as regular cream. In its dismissal letter shortly afterwards, the

DECISION: 82-19 (CONT'D)

employer cited a number of prior incidents regarding the grievor's work record; these incidents included carelessness, absence from his work area without notice, improper dress on the job, and insubodination. The employer stated in its letter that the grievor had been given opportunities to reform his performance and his attitude, and had shown no improvement.

The union argued that the grievor had been given harsher discipline than other employees who had committed similar infractions. The union also reviewed each of the prior incidents cited by the employer, and contended that the degree of the grievor's fault was, at the least, ambigious.

AWARD: The grievance succeeded, in part. The Arbitrator agreed with the company that in light of the grievor's past employment record and the seriousness of the mixing of the cream, the discipline should be heavy. However, the Arbitrator noted that the Employer's dismissal of the grievor appears to be out of line with its penalties against other employee infractions of a similar nature. Accordingly, the dismissal was reduced to a four month suspension.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration p. 377-78

DECISION: 82-20

Collavino - McCall Contractors Limited **AND** The International Union of Operating Engineers, Local 721

Judge J. A. MacLellan, Arbitrator
March 12, 1982

ISSUE: Interpretation of the Collective Agreement 4:2000; Definition of "major projects"

CIRCUMSTANCES: The Collective Agreement defined "major projects" as those construction projects which have a total tender value of $20,000,000 for power projects. (The Parties were engaged in constructing a tidal power project at Annapolis Royal.) If a project was defined as major, certain special benefits regarding hours of work and rates of pay would be re-negotiated, according to the union.

The issue, then, was whether an untendered turbine for the project should be included in the project cost. The total amount of the project's tenders was approximately $17,000,000. If the cost of the turbine was included, the figure would rise to approximately $34,000,000. Evidence established that the turbine was not tendered because of its special design, which was avialable only through one supplier; hence, the price was negotiated, rather than tendered.

AWARD: The grievance failed. The Arbitrator held that the turbine had not been put out to tender, and hence, was not to be included in the definition of "major projects".

DECISION: 82-21

Guysborough Municipal School Board **AND** Canadian Union of Public Employees, Local 1116

Judge J. A. MacLellan, Arbitrator

Ronald Blunden, for the union
William Biggs, for the employer
March 12, 1982

ISSUE: Retirement 7:7200; Employer Rules 4:1500

CIRCUMSTANCES: The grievor, a school bus driver, was retired by the School Board as he reached the age of 65. The School Board stated that they retired the grievor in accordance with Board Policy, and that the policy was being applied consistently and non-discriminately. The Collective Agreement was silent on the matter of a mandatory retirement age.

The union contended that the grievor, nor any other member of the bargaining unit, was aware of a mandatory retirement policy of the Board. It was argued that, in prior years, that school bus drivers had to retire at age 65 because of provincial licensing legislation governing school bus drivers. However, the legislation was changed in 1981 enabling bus drivers over 65 to maintain their license if they passed a test. The grievor passed the necessary test, and pointed out that he is in good health and had an examplary driving and employment record.

AWARD: The grievance succeeds. The Arbitrator reviewed the arbitial jurispurdence on unilaterally promulgated employer rules and held that, on the evidence, that the retirement policy had not been brought to the attention of the union and its members. Nor was the retirement policy consistantly enforced, as the evidence disclosed that another driver had been kept on for several months after his sixty-fifth birthday. The employer was ordered to reinstate the grievor with full pay until the end of the school year.

AUTHORITIES: Re KUP Co. Ltd. (1965) 16, L.A.C. 73; Re Oshawa Times (1977), 14 L.A.C. 375.

DECISION: 82-22

Town of Kentville **AND** Kentville Police Association

R. Lorne MacDougall, Q.C., Chairman; Charles MacDougall; and Matthew McPherson

Bruce Evans, for the union
Peter Muttart, for the employer
February 10, 1982

ISSUE: Remedial Authority of an Arbitration Board 2:1400; Calculation of Damages Following Wrongful Discharge 2:1410; Mitigation 2:1412

DECISION: 82-22 (CONT'D)

CIRCUMSTANCES: The grievor had been a police constable, who was dismissed by the Employer in January 1980. He subsequently grieved his dismissal. And, at the same time, accepted a position with the Glace Bay Police Department. A previous Arbitration Board held that the grievor's dismissal was improper; and review of the arbitrtion proceeding was dismissed by the Nova Scotia Supreme Court, Trial Division. The issue before this present Arbitration Board was whether the Board had jurisdiction to award compensation and, if so, how much.

The employer argued that, because the grievor was now an employee elsewhere, and, as well, that he confined his sole remedy to reinstatement, the grievor's remedy lies in the courts in an action for wrongful dismissal, and not before the Arbitration Board.

On the calculation of the damage award itself, the employer argued that the amount paid to the grievor through Unemployment Insurance payments should be deducted from any award. The employer also questioned the scope of the grievor's mitigation.

AWARD: The grievance succeeds. On the question of jurisdiction, a majority of the Board held that 5.41 (d) of the Nova Scotia Trade Union Act gives an Arbitration Board the power to award damages, even where such damages are not claimed in the grievance form. While the grievor could pursue a damage claim for wrongful dismissal in the courts, if he so chose, he is also able to seek compensation from an Arbitration Board.

The Board majority also ruled that the grievor did not lose his right to claim damages, nor did the Board lose its jurisdiction to award damages, simply because the grievor sought and accepted employment elsewhere. The only methods of removing the jurisdiction of a Board is through the withdrawal or abandonment of a grievance, or by mutual agreement of the Parties, none of which is present. Accordingly, the Board held that it had jurisdiction to make a damage award.

The Board calculated a total figure of $26,549.48 comprising the grievor's total lost wages from the date of dismissal to the present, including lost overtime and moving expenses. This figure was reduced by the grievor's earnings with the Glace Bay Police Department. The Board did not accept the employer's argument regarding U.I.C. deductions, holding that damages as awarded in a case for wrongful dismissal are something quite different at law than "remuneration" as referred to in the Unemployment Insurance Act. For present purposes, there is no discernable difference between a damage award for wrongful dismissal and damages for dismissal without just cause.

The Board majority, in calulating the damage award, applied the often used principle of placing the party who suffered the loss back into the position it would have been, as reasonably as possible, if the particular rights it enjoyed had not been violated. In regards to mitigation, the Board majority held that an employee where discharge is proceeding to arbitration is not required to accept work of a substantially lesser type than that from which he had been discharged.

DECISION: 82-22 (CONT'D)

AUTHORITIES: Garsky: Evidence and Procedure in Canadian Labour Arbitration p. 69, 37; Smith v. Worldwide Church of God et al (1980), 39 N.S.R. (ed) 449; Peck v. Leveque Plywood Ltd. (1979), 105 D.L.R. (3d) 520; Re Polymer (1959), 10 L.A.C. 31; Assn of Radio and Television Employees of Canada v. CBC (1974) 40 D.L.R. (3d) 1; Re Yukon Containers (1970), 21 L.A.C. 167

DECISION: 82-23

Canadian Paperworkers Union, Local 440, AND Scott Maritimes Ltd.

Eric G. Demont, Chairman; Roseanne Skoke - Graham, D. Merlin Nunn

Dennis Grant, for the union
Hector McInnes and Sara Filbee, for the employer
December 3, 1981

ISSUE: Compensation - Premium Rates and Bonuses - Overtime 8:2100; Compensation - Premium Rates and Bonuses - Overtime Work 8:2130; Interpretation of Collective Agreement - The Collective Bargaining Context 4:2300; Scheduling Work - Work Hours and Shifts 5:3100

CIRCUMSTANCES: The grievor was employed by the company as a labourer working an 8:00 a.m. to 4:00 p.m. shift Monday to Friday. He was also trained to fill in for absent oilers who worked twelve-hour shifts in a compressed work week. On the day in question, he was asked, forty-five minutes after beginning his regular shift, to fill in for an oiler who did not report for work. He worked until 8:00 p.m. and was paid for twelve hours work at the oilers' rate. His grievance, in which he claimed for the extra four hours at premium pay of one-half of the regular rate, was based on the section of the Collective Agreement which stated that if the day workers (e.g. the labourers) did not receive 24 hours notice of "a temporary change in their normal schedule of hours" they would be paid time and one-half for the hours worked between 4:00 p.m. and 8:00 a.m. on the first day of the changed schedule.

The company argued that this situation was covered by another article of the Collective Agreement which dealt specifically with the relief of absent oilers and the rates of pay.

AWARD: The majority of the Board found that the replacement of an employee who does not report for work did not constitute a "temporary change in the normal schedule of hours for day workers" since it would be impossible to anticipate this twenty-four hours in advance. If the grievor's interpretation of this clause was accepted, it would render meaningless the specific conditions outlined for the replacement of oilers. Therefore the grievance failed.

DISSENT: (Skoke - Graham) the union nominee, dissented with the majority decision. She found that the two clauses in question referred to different groups of workers and therefore the Collective Agreement did not provide for a worker who fell into both categories, as the grievor did. In a case where two clauses conflict the clause imparting a right (pay in lieu of 24 hours notice) should override a restrictive clause (giving a replacement oiler straight pay).

DECISION: 82-24

Nova Scotia Forest Industries AND Canadian Paper Workers Union

S. Bruce Outhouse, Arbitrator

Dennis Grant, for the union
Eric Durnford, for the employer
February 16, 1982

ISSUE: Job Posting - Whether Requirements Reasonable 5:2520

CIRCUMSTANCES: The grievor, a clerk typist in the payroll accounting department of the Company, applied for the posted position of payroll accounting clerk. Although only a temporary employee, she was the most senior applicant for the job. The job was awarded to another applicant.

The posting required that applicants have a two year business administration technology course or equivalent, which was a higher qualification requirement than previous postings for the same position. The grievor did not have the necessary qualifications for the new requirements; however, she contended that the new requirements were too high for the position, and that her training and background were sufficient for the job's equivalent qualifications.

The Collective Agreement required the employer to state the "qualifications essential for the job", and, as well, compels it to recognize seniority, albeit in a limited way, in the selection process.

AWARD: The grievance succeeds in part. The Arbitrator held that the Collective Agreement restricted the employer in the establishment of job qualifications, such that they must reasonably relate to the essential duties of the position. Otherwise, the employer could easily circumvent the seniority rights of employees by establishing unreasonable qualification requirements.

On the evidence before him, the Arbitrator held that the requirement for the business administration technology course could not reasonably be regarded as an essential qualification for the posted position. However, the Arbitrator held that it would be inapporpriate for him to simply award the position to the grievor. Instead, the employer was directed to conduct a new competition for the position, including a new job posting, with the seniority of the candidates to be taken as the date of the original job posting, in order not to prejudice the grievor.

AUTHORITIES: Re Metropolitan Toronto Board of Commissioners of Police (1981), 124 D.L.R. (3d) 684 (Ont CA); Re Libbey - St. Clair Inc. et al (1981), 125 D.L.R. (3d) 702 (Ont H.C.)

DECISION: 82-25

Halifax Infirmary Hospital AND Nova Scotia Nurses Union

W. Brent Cotter, Chairman; Raymond Larkin and Donald McDougall

DECISION: 82-25 (CONT'D)

David Reynolds, for the union
Eric Durnford, for the employer
January 29, 1982

ISSUE: Employer Requirement for Employee to Undergo Medical Examination 7:3230; Sick Leave 8:3300; Company Rules 4:1500; Nature of Arbitial Process 1:2000

CIRCUMSTANCES: The grievor, a nurse, became ill and was advised by her family physician to take several weeks off work. He gave her a certificate to that effect, and the Hospital administrtion advised the grievor to bring the certificate in when she returned to work. When her sick leave documentation expired, the Hospital administration requested the grievor to see the staff health doctor; the grievor refused. The hospital then unilaterally set up a doctor's appointment for the grievor, in large mearsure to ascertain whether she should remain entitled to paid sick leave.

The grievor did not go to this appointment; instead returned to her family physician, who certified that she remained unable to return to work because of illness. The grievor forwarded both certificates at this time to the Hospital, and, as well, resigned her position effective the day her paid sick leave would expire. The Hospital refused her request for paid sick leave after the date of the arranged doctor's appointment, since its personnel policies manual reserves to the employer the right to require the employee in question to be examined by the Hospital Health Service. The Hospital argued that the Management Rights clause in the Collective Agreement incorporates the policy manual and that the grievor had the manual rules explained to her when she started work. The union argued in response that the employer's action imposing a hospital-approved doctor's appointment before the grievor can be eligible for sick leave benefits was an unreasonable standard.

AWARD: The grievance succeeds. A majority of the Board held that where an employer seeks to impose certain prerequisites upon its employees before the employee may become entitled to a certain benefit, the prerequistes may create a conflict with the collective agreement whenever the standard is set too high. The test for such prerequisite rules must be their reasonableness, which must be tied to the standards that a board of arbitration would impose upon a grievor in a claim for benefits under the relevant clause of the Collective Agreement.

Applying this to the present case, the Board majority found that the employer's rule requiring the employee to submit to a medical examination by the employer's physician in order to become entitled to paid sick leave is not a reasonable rule. The Board majority observed that the medical opinion of an employer's doctor would, at the least, have the appearance of bias, and might well prejudice both the employee's claim and his or her right to grieve. While a practicing family physician may err on the side of the patient-employee, he or she would at least be able to make a diagnosis which has no connection with their employ or their employers.

DISSENT: One Board Member dissented, holding that the personnel policy rule in dispute was valid and it was properly applied in this situation. His dissent was based on several grounds:

DECISION: 82-25 (CONT'D)

A. The Board majority based its conclusion concerning the un-reasonableness of the rule on their "general knowledge" and not on any specific evidence led by the Union.

B. The Board majority imported a "reasonableness" test into the Collective Agreement which is not there. The tests of "reasonableness" would only apply to disciplinary provisions in the Collective Agreement.

AUTHORITIES: Majority Opinion: Re Fruehauf Trailer Co. of Canada Ltd. (1951), 2 L.A.C. 781; Re KVP Co. Ltd. (1965), 16 L.A.C. 73; Re Ex-Cell-O Corp. (1976), 10 L.A.C. (2d) 44; Re Canadian Fram Ltd. (1973), 3 L.A.C. (2d) 94; R v. Board of Arbitration, ex porte United Steel Workers of America, Local 4752 (1969), 7 D.L.R. (3d) 571 (Ont. H. Ct.); Re City of Toronto (1974), 7 L.A.C. (2d) 160; Re Eaton Automotive Canada Ltd. (1969), 20 L.A.C. 218; Re Martindale Sash and Door Ltd. (1972), 1 L.A.C. (2d) 324.

Dissenting Opinion - (cases not mentioned by majority opinion). Re Governors of Dalhousie University (1980), 39 NSR. (2d) 655; Re Eastern Provincial Airways (1963) Ltd. (1981), 29 L.A.C. (2d) 306; Brown and Beatty, Canadian Labour Arbitration p. 12-13

DECISION: 82-26

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

Innis Christie, Arbitrator

Ronald Pink, for the union
William Wilson, for the employer
February 11, 1982

ISSUE: Sick Leave 8:3300

CIRCUMSTANCES: The grievors, although covered by different Collective Agreements with the employer, both alleged breach of the paid sick leave clause which, in both cases, is worded identically. The respective provisions enabled the Deputy Head of the particular government department to require an employee to produce a certificate from a medical doctor for any period of absence for which sick leave is claimed. If the requested certificate is not produced, the time absent from work will be deducted from the employee's pay. The second provision allowed the employer to require the employee requesting paid sick leave to complete his or her application in a manner specified by the employer, if the sick leave period in question was between four and five days. The employer had subsequently circulated a memorandum which created a certification procedure for employees requesting paid sick leave.

Both grievor's were absent from work for one day. They both subsequently produced a note on a doctor's prescription pad containing only the grievor's name, the date, and the hand written statement "unfit for work today" and the doctor's signature. The request for paid sick leave was denied, on the grounds that the required form had not been used.

DECISION: 82-26 (CONT'D)

In addition, one of the grievors was absent from work on another day with teeth problems. No medical certificate was produced by the employee, and her request for sick leave was denied.

The union argued that the first provision only entitles the employer to ask for a "medical certificate", from an employee requesting paid sick leave for a period of less than four days. Thus, by implication, the employer is precluded from further specifications with respect to the manner of reporting the illness, such as is required elsewhere in the Collective Agreement for longer illnesses.

AWARD: The grievance fails. The Arbitrator held that the union's acceptance of the certification procedure in the event of illnesses for four or five days is inconsistent with its present interpretation of the Collective Agreement. In circumstances involving a sick leave claim after the fact, as here, the employer's entitlement to require a particular form of medical certificate is in accordance with its right to make rules, vis-a-vis its management rights. Given the evident purposes of the requirements of a medical certificate, it is not unreasonable for the employer to require more than a barebone's statement that the employee was unable to attend work.

AUTHORITIES: Re K.V.P. Co. Ltd. (1965), 16 L.A.C. 73; Re Eastern Provincial Airways (1963) Ltd., (1981), 29 L.A.C. (2d), 306

DECISION: 82-27

The Canadian Brotherhood of Railway, Transport and General Workers', Local 606, AND Dartmouth General Hospital and Community Health Centre

Brian Langille, Chairman; Ray Hill, Matthew J. McPherson

Ronald A. Pink, for the union
Gregory I. North and Terry Roane, for the employer
January 29, 1982

ISSUE: Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100; Probationary Employees - Measurement of Probationary Period 7:5010

CIRCUMSTANCES: The grievor, who worked full-time as a Utility Worker for the employer, received a promotion to working part-time as a Printroom Operator (i.e. he worked some hours as a Utility Worker and some hours as the Printroom Operator). As a permanent employee, the grievor understood that he would serve a probationary period of one month, as stated in the Collective Agreement, before receiving the designated raise for the position. He interpreted this to mean one calendar month. The employer interpreted this to mean 165 hours, or one month actually worked in that position, since elsewhere in the Collective Agreement the probationary period for part-time employees was expressed in terms of hours.

DECISION: 82-27 (CONT'D)

Counsel for the Union argued that the parties to the Collective Agreement, being conscious of how they determined time periods, would have said working month if that had been the intention. In the absence of this specification, the word must be interpreted to mean what it usually does - one calendar month.

AWARD: The majority of the Board found that "month" must be interpreted in light of the purpose which the probationary period is meant to serve. To not interpret month to mean working month would lead to the possibility that the purpose of the probationary period would be frustrated if that period coincided with the rights of absenteeism (e.g. holidays) accorded to the permanent employee who was promoted. The Board also pointed to the article of the Collective Agreement dealing with sick leave which specified "calendar month".

DISSENT: Mr. Hill, the Union nominee, dissented from the majority award. He was of the opinion that the word "month", in the absence of any specifications must refer to calendar month.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 159-60; Teamsters, Chauffeurs, Warehousemen, Helpers and General Workers, Local 927 and Sanborn's Motor Express Limited, August 9, 1979, unreported.; Re Royal Canadian Hint and Public Service Lines [sic] of Canada (1975), 11 L.A.C. (2d) 63; Palmer: Collective Agreement Arbitration in Canada, p. 237

DECISION: 82-28

Pictou County Municipal School Board AND Canadian Union of Public Employees

R. Lorne MacDougall, Q.C., Chairman; Richard Goodman and Robert Street

Gerald Yetman, for the union
Alex Skoke, for the employer
February 4, 1982

ISSUE: Suspension for not following Employer Rules 7:3610

CIRCUMSTANCES: The grievor, a bus driver for the School Board, was having difficulty with a student on her bus. After he refused her order to leave the bus, she drove the bus to the school principal's home, which was on her regular route, and the boy was taken off the bus there, by the principal.

Three days later, the grievor was informed by her supervisor that she was suspended until the School Board meeting the following week for two reasons: i) When a student is causing problems on a bus, the grievor should have called the police (instead of proceeding to the principal's house) as stated in Board policy; ii) The grievor did not file a report on the incident on her next work day.

AWARD: The grievance succeeds. A majority of the Board held that while there had been a technical infraction of the rules by the grievor, in all the circumstances

DECISION: 82-28 (CONT'D)

the penalty is too severe and should be substituted by a warning letter from the employer. The Board majority noted that the length of the suspension was determined solely by the date of the forthcoming Board meeting and not by the merits on the incident. This was against the principle of industrial discipline.

DISSENT: One Board member dissented, holding the the failure of the grievor to file a report justified a suspension of three days.

DECISION: 82-29

Canadian Paperworkers Union, Local 440 AND Scott Maritimes Limited

S. Bruce Outhouse, Chairman; D. Merlin Nunn and Roseanne M. Skoke-Graham

Dennis Grant, for the union
Hector McInnes, for the employer
February 4, 1982

ISSUE: Limited to the Arbitration of Grievances: Arbitrability Waiver of Procedural Irregularities 2:3130; Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400; Scheduling Work - Proprietory Rights to Overtime Assignments 5:3220; Distribution of Work Within the Bargaining Unit - The Requirement of Bona Fides 5:2300; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100

CIRCUMSTANCES: Five employes from the office, clerical and technical workers bargaining unit grieved because they were not asked to work overtime helping the maintenance workers (members of the other bargaining unit in the collective agreement) during a total mill shutdown. Temporary employees were hired on the date in question. Although the five grievors did not cite the article in the collective agreement upon which these grievances were based, they did state that it had been past practice to ask workers from their bargaining unit to work the overtime.

At the outset of the hearing, the employer lodged a preliminary objection to the Board's jurisdiction based on the fact that the grievances failed to specify the sections of the collective agreement being violated as stated in the grievance procedures of the collective agreement. Union representatives testified that they had brought this deficiency in the grievances to the attention of the employer's representatives but had been assured verbally that it was not a problem Throughout the grievance process, the employer had dealt with the case on its merits and had raised no objection until this arbitration. Therefore, the Board considered that the employer had waived its right to object to the form of the grievances. The Board also drew attention to Section 7 of the Trade Union Act, S.N.S. 1972 which provides that no proceedings under the Act are "invalid by reason of any defect in form or any technical irregularity".

Having dismissed the objection, the Board dealt with the merits of the case.

DECISION: 82-29 (CONT'D)

The grievances appeared to rely on past practice as the foundation for their right under the collective agreement to preference over temporary employees in the allocation of overtime maintenance work during mill shutdowns. The single incident of past practice occurred in 1979 when the employer offered all hourly employees, including the office, clerical and technical staff the opportunity to work with the maintenance staff during their days off or when not required for their regular jobs. Although some of the male employees in that bargaining unit received overtime work, no females did.

One female employee successfully grieved this. The employer had not made the same offer since.

The collective agreement reserved the employer's right to manage the operation of the mill in all respects, including the deployment of the work force and the allocation of overtime, subject only to specified restriction. No such restrictions applied to the office, clerical and technical workers, nor was there a provision requiring the employer to distribute overtime equitably among its employees.

The union also alleged that the employer had discriminated against the grievors on the basis of sex, although two the grievors were male, because the majority of their bargaining unit were female. Evidence was given of a statement by the mechanical superintendent during the 1979 shutdown that girls could not work out in the mill because they (i.e. the employer) were not prepared.

The employer contended that it did not offer the work to the office, clerical and technical bargaining unit solely for business reasons, which it summarized. The reasons were based on the times those employees were available for work, their familiarity with the mill, their lack of availability for indoctrination sessions and the preference to provide those employees in the other bargaining unit whose jobs were affected by the shutdown with alternate work. The employer also adduced evidence to demonstrate that it was not pursuing an overt discriminatory employment policy.

AWARD: The Board stated that past practice can aid in interpreting ambiguities in the provisions of a collective agreement or it can in cases of narrower scope create a defence in the nature of a promissory estoppel. However, it does not constitute a valid basis for the assertion of positive rights which must be found in the collective agreement or other applicable legislation. In this case, the collective agreement made no such provisions. Nor did the majority of the Board find that the allegation of discrimination was proven on the balance of probabilities. Therefore, the grievances were dismissed.

DISSENT: (Skoke-Graham) dissented with the majority of the Board and found that the employer wrongfully discriminated against the office, clerical and technical workers bargaining unit, acting in bad faith, on the basis of the sex of those employees. She based her opinion on the evidence that some of the work could be performed by female employes, the discriminatory comment of the mechanical superintendant and the fact that the male technical staff had worked overtime during mill shutdowns.

DECISION: 82-30

Dartmouth General Hospital AND Canadian Brotherhood of Railway, Transport and General Workers

Bruce Outhouse, Chairman; Dan Hood and Greogry North

Ronald Pink, for the union
Donald McDougall, for the employer
January 29, 1982

ISSUE: Employer Refusal to Permit Attendance of Shop Steward at Disciplinary Meeting 7:2100

CIRCUMSTANCES: The employer had refused to allow the grievor, in his capacity as shop steward, to attend disciplinary meetings between the employer and five of its employees.

The union argued, firstly, that this action violated the Collective Agreement's provision which allowed employees to commence the grievance process immediately upon being disciplined. The prior practice at the workplace had been for the steward to attend the initial disciplinary meeting, and frequently the grievance process was set in motion at that time. The company's reply was that a steward's attendance at a disciplinary meeting was not required; he only had an express right to be present at the first step of the grievance process.

The union's second argument was that the Collective Agreement provided for a grievance committee, made up of shop stewards, who would deal with "all complaints and grievances". The union argued that "complaints" in this context allows the shop steward to be present at disciplinary meetings. The company denied that "complaints" bare this meaning.

AWARD: The grievance fails. While the impostion of discipline is often the source of grievances, it is not part of the grievance process *per se*. Hence, excluding the shop steward from disciplinary meetings does not infringe on an employee's right to file a timely grievance, or in obtaining a steward's assistance to assist in the grievance process. The Arbitration Board majority also ruled that "complaint," in this context, merely means a verbal grievance and denotes the informal stage of the grievance process.

DECISION: 82-31

Volvo Canada Limited, AND United Automobile Workers of America, Local 720

Bruce Outhouse, Arbitrator

Larry Sheffe, for the union
John Merrick, for the employer
February 2, 1982

ISSUE: Changes in Job Function 5:2410

DECISION: 82-31 (CONT'D)

CIRCUMSTANCES: The employer had reorganized certain work within the bargaining unit. Previously, cars coming off the assembly line were reviewed first by an adjuster - who would correct any problems noted during the 'roll test' - and then by a final inspector, who would inspect the adjustments, and look for any last problems. After the re-organization, separate adjusters would inspect the car's underbody and upper body for necessary adjustments; accordingly, the final inspector's role was substantially reduced. The Colective Agreement contained a provision for arbitration to decide the wage rate of a new job classification, if negotiations between the parties failed.

The Union argues that a new position of underbody adjuster had been created, since it combined the old adjustment and inspection functions. Accordingly, the new classification should receive the same rate of pay as the final inspector rate, since the underbody adjuster has been given comparable inspection duties. In reply, the Employer argued that the reorganized underbody adjuster's job does not approach the complexity of the final inspector's job, and should neither be re-classified nor receive the same pay as a final inspector.

AWARD: The grievance succeeds in part. The re-organized underbody adjuster's position now has greater responsibility than a regular adjuster; however, the new position, because of its hybrid nature, fits within neither the present adjuster nor the final inspector classifications, but rather, falls somewhere in between. Taking the various factors of the new job responsibilities into account, the Arbitrator awarded a new pay rate that was half-way between the difference of the adjuster's and the final inspector's wage rate.

DECISION: 82-32

East Cumberland Lodge **AND** Canadian Union of Public Employees

Judge J. A. MacLellan, Chairman; Eric Durnford and Rick Clark

Ray Hill, for the union
Deborah Carver, for the employer
January 19, 1982

ISSUE: Suspension; Work Performance 7:3500

CIRCUMSTANCES: The two grievors, nurses' aids at the Senior Citizens' Residence, were given a month's suspension each, after complaints about their work performance. Specifically, there were allegations of personality conflicts between the grievors and other nurses' aids, and problems with the grievors' handling of patient problems. The grievors denied the allegations and cited examples where their performance had been commended.

AWARD: The grievance succeeded in part. The majority of the Board, after considering the large amount of evidence before it, reduced the suspensions to two and three weeks. There were some grounds for suspending the grievors, but in light of the grievor's length of service, past employment record, and improving personnel relations since the suspension, the suspicions were varied.

DECISION: 82-32 (CONT'D)

DISSENT: One Board member dissented. He noted that many of the alleged incidents were not brought to the grievor's attention until the suspension, although they had occured over a period of time. Nor, in his opinion, did the employer establish that the alleged incidents were intentional, neglictful or occurred because of lack of concern over the patient's physical and mental welfare.

DECISION: 82-33

Bakery, Confectionary & Tobacco Worker Union, Local 446 AND Eastern Drug Services

D. Merlin Nunn, Q.C., Chairman; Rick Clark and Eric Durnford

Wallace Jewers, for the union
Donald McDougall, for the employer
April 14, 1982

ISSUE: Discipline 7:0000; Carelessness 7:3520; Alteration of Grounds 7:2200; Warnings, Suspension, Discharge 7:3542; The Doctrine of the Culminating Incident 7:4310; The Reasonableness of the Penalty 7:4300; Mitigating Factors 7:4400

CIRCUMSTANCES: The union grieved the dismissal of the grievor. The grievor drove a delivery truck. The employer's directions concerning security were not clear. On one particular occasion, the grievor left his truck unattended and unlocked for 10-15 minutes. When he returned, the stock was short three (3) cases of cigarettes (value: $1,125.80). The employer discharged the grievor, giving written reasons as required by the Collective Agreement; justifying the discharge on the basis of this one particular incident. The grievor's testimony about this incident was contradicted in several important respects, and the Board concluded that the grievor was not being completely candid. At the hearing, the employer also attempted to rely on two earlier unrelated incidents.

AWARD: The grievance succeeds in part; a suspension of almost three months is substituted for discharge. The doctrine of culminating incident cannot be invoked when the employer had previously given reasons relying on only one incident. The employer is not at liberty to change the grounds. Given the lack of a clear policy on security, discharge is too severe a penalty for the one incident under consideration. However, the lack of care was serious, and the grievor's lack of candour affects the board's discretion of what lesser penalty should be sustituted. The grievor is reinstated but with no compensation.

DISSENT: The seriousness of the incident, combined with the grievor's lack of candour are such that the board should not exercise its discretion to substitute a lesser penalty.

DECISION: 82-34

Pilkington Glass Limited (Halifax Glass Center) AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Union, Local 927

Judge J. A. MacLellan, Arbitrator

Doug Beuree, for the union
Eric Durnford, for the employer
May 6, 1982

ISSUE: Refusal to Follow Instructions 7:3610

CIRCUMSTANCES: The union grieved an eleven day suspension given to the grievor. At the time of the incident giving rise to the suspension, business was very slow, and management was, in effect, making work for its employees. The grievor was assigned as a third man on a job which would ordinarily be done by two. The grievor said to the manager, "If that's all you have for me to do, I'm going home". The manager responsed, "If that's you attitude, go.". The grievor left. He was later given the eleven day suspension.

AWARD: The grievance is dismissed. The grievor was wrong not to follow instructions, and the penalty was not inappropriate.

DECISION: 82-35

United Steelworkers of America, Local 4700 AND Ferguson Industries Limited

Judge Nathan Green, Arbitrator

W. A. Parsons, for the union
T. Donovan, for the employer
May, 1982

ISSUE: Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400; Remedies for Improper Work Assignments 5:1500

CIRCUMSTANCES: The grievor, a truck driver, concluded his shift and parked his truck. That evening, the truck was needed for a small task. The supervisor decided that it would not be convenient for any bargaining unit employees then on shift to drive the truck. The supervisor did the work himself; it took about 10 minutes. There was a provision in the Collective Agreement prohibiting supervisors from performing bargaining unit work, except in emergency. The grievor would have been available to come into work.

AWARD: The grievance succeeds. If no bargaining unit employee on shift was available, the grievor should have been called in. The grievor is entitled to call in pay at the minimum of four hours pay.

DECISION: 82-36

College of Cape Breton AND Nova Scotia Government Employees Union

D. Merlin Nunn, Q.C., Chairman; Gerald Yetman and Arthur LeBlanc

Ronald Pink, for the union
J. Bernard Boudreau, for the employer
April 1, 1982

ISSUE: Bargaining Unit Definition in terms of Employees 5:1120; Term Employee - Included in Bargaining Unit 5:1124

CIRCUMSTANCES: The grievor was hired as a full-time term employee, and, at the end of the one-year term, her job was made permanent and she was given a first year job and pay classification. She received no credit by way of classification for the first year that she was performing the work. Nor was the grievor awarded full retroactive pay after the signing of the new Collective Agreement, on the basis that she was not, as a term employee, a member of the bargaining unit.

The issue between the parties was whether, as a term employee, the grievor belonged to the bargaining unit. The answer to this would answer whether the grievor was entitled to retroactive pay. As well, the parties disputed whether the grievor would receive classification credit for her service as a term employee. The Collective Agreement stated that: "A term appointee may apply for any position opening in the bargaining unit which occurs during his term appointment. His period of employment in the term position at the time of application will be counted as service with the employer".

AWARD: The grievance succeeds in part. A majority of the Board held, on the plain meaning of the words of the Collective Agreement, that a term appointment is not "within the bargaining unit". The expression "full-time" employees was held to mean permanent employees as opposed to term employees. Hence, the grievor failed in her claim for retroactive pay, since she was not a member of the bargaining unit for the bulk of the period which the retroactive pay covered. However, the grievor was entitled to a higher classification, since her term employment would be counted as service.

DISSENT: One Board Member dissented, on the grounds that if "term employees" was to be excluded from the bargaining unit, it should be explicitly stated.

DECISION: 82-37

Canadian Union of Public Employees, Local 1233 AND Municipality of the County of Cumberland

A. M. Stevenson, Chairman; W. Mont and C. Weir

Mr. Cunningham, for the union
Mr. Lemoine, for the employer
April, 1982

DECISION: 82-37 (CONT'D)

ISSUE: Grounds for Discipline - Work Performance - Carelessness 7:3520; Disciplinary Penalties - Mitigating Factors 7:4400

CIRCUMSTANCES: The two grievors were suspended without pay from their jobs as security officers at the Cumberland County Correctional Centre for alleged acts of negligence which aided in the escape of an inmate. Both grievors felt that the length of suspension was excessive under the circumstances and that a lesser degree of discipline would be more reasonable. The facts surrounding the escape were agreed to by both grievors and employers.

The first grievor was the sole officer on duty on the first floor of the Centre, where the inmate was being detained. Although there existed no written job descriptions for this duty, his tasks were varied - assisting prisoners with meals, answering the phone, admitting visitors and prisioners returning from passes and other related tasks. On the day in question, the grievor had provided the inmate with a broom to sweep out his cell. While he was supervising this, the phone rang. He assumes that in his haste to answer the phone, he failed to ensure that the cell door was locked. The grievor passed the cell several times after that, the final time being to escort two trustees to the dining room where it was customary for the officers on duty to join the trustees for coffee. Everything seemed in order in the inmate's cell.

Because the two officers on duty upstairs had not joined the trustees, the grievor attempted to ascertain that they were not in difficulty. Two way radios which had previously been in use were all in disrepair and had not been replaced and there was no answer when he used the telephone intercom. This necessitated the grievor leaving the first floor to check on the safety of the staff on the second floor. Returning he saw a step-ladder leaning against the wall surrounding the Centre. He immediately checked on the inmate and ascertaining he had escaped, contacted his supervisor and the police.

The second grievor was charged with negligence because the step-ladder the inmate had used in his escape was one he had borrowed, with permission, from the Centre and returned several days earlier. He replaced it behind the garbage shed located in the compound, exactly where he had originally taken it from. His letter of suspension accused him of "lack of insight into security precautions", although no formal rules of security had ever been circulated to the staff, except through the posting of memoranda on bulletin boards as the occasion arose. Procedures had developed over the years through use and were learned on the job. Nor had the staff had formal instruction in security since the new Centre had been remodelled over two years earlier.

The first grievor's letter of suspension also charged him with failure to lock two outside doors in the admission area, although these doors had long been kept open in order to compensate for a ventilation problem.

In was also noted in the evidence that the inmate had excaped over the fence in the one area where no razor-wire had been strung across the top. This omission had been repeatedly brought to the attention of authorities but no action had been taken.

DECISION: 82-37 (CONT'D)

The decision of the degree of discipline was left to the Superintendent who had no resources in resolving matters of staff discipline, although he did discuss the problem with his supervisor. He acknowledged that one senior official in the Department of Corrections said the officers should be fired.

Both grievors were competent employees who had not been previously disciplined.

AWARD: The Board felt that lack of proper physical security precautions on the part of the Centre as well as the lack of developed operating standards contributed to the escape of the inmate as much as the actions of the grievors. It was noted that some of these had been corrected since the incident, such as the posting of two guards on duty on the first floor. It was felt that serious negligence was not established.

The first grievor's suspension was reduced from twenty days without pay to five. Compensation was to be made for the 15 day balance and all documents relating to the matter were to be altered to reflect the level of suspension.

The second grievor's suspension was eliminated. Compensation was to be made and any reference to his involvement was to be removed from the records.

DECISION: 82-38

International Longshoremen's Association, Local 1039, Shipliners, of the Port of Saint John, N.B. AND Maritime Employers Association

Innis Christie, Arbitrator

Allan Booker, Art Robinson, David Duplessis, Timothy Humphrey, Murray Connell and Bill Clark, for the union
A. E. Masters, R. L. Lacroix, Douglas W. Bettle, Charles C. Kane and Raymond Armstrong, for the employer
May 4, 1982

ISSUE: Organization and Direction of the Workplace 5:0000; Interpretation of Collective Agreements - The Collective Bargaining Context 4:2300; Union Rights, Union Security 9:1200

CIRCUMSTANCES: Negotiations for renewal of the Collective Agreement between the two parties resulted in a Memorandum of Agreement with respect to all matters in dispute except for proposed changes in the section governing manning requirements. Rather than face an impasse on this issue, the parties agreed to continue the use of the disputed clause as outlined in the existing agreement and allow an Arbitrator to decide the contents of the clause in the new agreement. The wording of this clause had long been in dispute and the parties had recently gone to arbitration over the interpretation.

The disputed clause set out the requirements for supervisory personnel, i.e. either a walking boss or a foreman, for each "Job", based on the number of men working.

DECISION: 82-38 (CONT'D)

Disagreement arose over the definition of the word "Job", in which the union made concessions in its proposals submitted in the Memorandum of Agreement. That left the only issue in dispute the case in which two jobs being done simultaneously, other than non-ship work, to what extent the foreman employed on each job be a working foreman based on the number of men he is supervising. Management's position was that a foreman should be a working foreman should be a working foremen for four men on a job except in the case of a conventional ship where men are working in separate holds. The Union contended that the foreman be a working foreman for three men on the job. The serious issue was the number of Union members, including foremen and walking bosses, who must be hired, expecially when working on container ships, not whether supervisory premiums were to be paid, since the wage differential was small.

The M.E.A. argued that up to six men could work effectively without a non-working foreman, as evidenced by the Agreement in the case of non-ship work, except in conventional ships where the proposal made exception. They stressed that work on a container vessel is repetitious and does not require constant supervision. They also noted that in the Port of Halifax, the primary competitor to the Port of Saint John, the degree of supervision is a management decision.

The union maintained that the historical difference in union jurisdiction and trade demarcation lines between Halifax and Saint John meant that the Halifax experience could not be called upon. They submitted that jobs done for any one Company were more physically spread out than ever and therefore the Company's walking boss may not be readily available. Consequently non-working foremen were necessary for each job to proceed efficiently. The union also stressed the concessions they had already made on the definition of "Job".

AWARD: The Arbitrator stated that efficiency was not the only criterion in making this decision; if it had been, then the amount of supervision required would be at the discretion of the employer. However, he pointed out that the manning requirements had been the results of negotiations in which the union has sought to protect the job security of its membership in both the short term and in the long term by maintaining reasonable efficiency in the Port as well as their interest in taking orders only through their own boss or foreman.

He pointed out that the union had successfully challenged the efficiency of a four-man crew without a non-working foreman who must take orders from the members of other unions, as suggested by M.E.A.

The Arbitrator also took into consideration the concessions already made by the union and submitted a re-worded clause which agreed with the union's proposal for the ratio of supervisory personnel to men and cleared up the ambiguity in the definition of "Job".

DECISION: 82-39

Construction Association Management Bureau Limited (Joneljim) AND Painters and Allied Trades, Local 1945

DECISION: 82-39 (CONT'D)

Charles O'Connell, Arbitrator

G. J. McConnell, for the union
G. I. North, for the employer
May 10, 1982

ISSUE: Adjournments 3:2300; Collective Agreement 4:0000

CIRCUMSTANCES: The union grieved the violation of the Collective Agreement by a subcontractor of Joneljim. Management contended that the subcontractor, which was not unionized, was not bound by the Collective Agreement. The union requested an adjournment, to enable a ruling by the Labour Relations Board.

AWARD: The hearing was adjourned, after which the matter was settled, and the union withdrew the grievance.

DECISION: 82-40

Nova Scotia Armature Works Limited AND International Brotherhood of Electrical Workers, Local 625

Judge J. A. MacLellan, Arbitrator

Gerald McConnell, for the union
Don Merson and Tom Coldwell, for the employer
May 11, 1982

ISSUE: Grounds for Discipline - Fighting, Assault 7:3430; Disciplinary Penalties - Mitigating Factors - Employer Conduct - Discrimination 7:4414; Disciplinary Penalties - Scope of Review 7:4100

CIRCUMSTANCES: The grievor alleged that the company did not have just cause for his dismissal following an incident of fighting with another employee. He had been spoken to by company officials several years earlier when he had been involved in a scuffle with another worker but had not been lead to believe a further incident would lead to dismissal.

The general manager of the company testified that he had no first-hand knowledge of the fight nor was he interested in knowing who started the fight. He stated that the grievor was dismissed because of a company rule against fighting although he also confirmed that no disciplinary action had been taken against the other employee involved.

AWARD: The judge allowed the grievance. He found that the grievor was not completely at fault although the other employee involved was not disciplined in any way. Nor did he find that the grievor's behavior had the effect of challenging the company's authority, prejudicing its public image, or endangering the interests of the other employees as justification of the company's disciplinary action, although he agreed the company had the right to impose a "no fighting" rule.

DECISION: 82-40 (CONT'D)

The judge ordered that the grievor be reinstated immediately with full pay and benefits from the date of discharge. In substitution, since the company had a right to enforce the rules on fighting, the company was to issue a letter of reprimand to the grievor advising him that further action of this kind may result in a much more severe penalty, a copy of which was to be placed in his file. In addition, a copy of the Arbitration award was to be placed in his file.

DECISION: 82-41

The City of Sydney **AND** Canadian Union of Public Employees, Local 933

Judge J. A. MacLellan, Arbitrator

Gerald Yetman, for the union
M. G. Malley, Q.C., for the employer
May 21, 1982

ISSUE: Distribution of Work Within the Bargaining Unit - Express Prohibitions in the Agreement 5:2200; Distribution of Work Within the Bargaining Unit - Compliance with the Wage Structure 5:2400; Distribution of Work Within the Bargaining Unit - Revision of Classification and Rates 5:2440

CIRCUMSTANCES: The union grieved when a job posting placed by the City differed from the job description agreed on in the Collective Agreement in responsibilities and, more importantly, in salary range. The job was for a person to administer a housing rehabilitation program in the city.

The city argued that the demise of a government assistant program formerly handled by the incumbent of said position, in addition to the one still in existence, had reduced responsibilities, thereby leading to a different job description and a reduced salary.

AWARD: After hearing extensive evidence on the responsibilities involved in administering both housing rehabilitation programs, the Judge agreed that there was a reduction in responsibility. However, he found that the qualifications required and the responsibilities involved in the existing situation warranted a salary higher than that offered by the city although slightly lower than expected by the union.

DECISION: 82-42

Bakery, Confectionary and Tobacco Workers Union, Local 446 **AND** Eastern Drug Services

D. Merlin Nunn Q.C., Chairman; Rick Clarke and Eric Durnford

DECISION: 82-42 (CONT'D)

Wallace Jewers, for the union
Donald H. McDougall, for the employer
April 8, 1982

ISSUE: Discipline and Discharge Procedures - Proceedings Prior to Arbitration 7:2100; Limits to the Arbitration of Grievances: Arbitrability - Collective Agreement Limitations 2:3100; The Power to Discipline - Collective Agreement Limitations 7:1300

CIRCUMSTANCES: The two grievors were dismissed in February, 1982 for reasons, as outlined in the letters of dismissal, for incidents which took place in November 1981. The union did not feel that the dismissals were valid because it interpreted the reasons for dismissal as a grievance by the Employer, which, according to the Collective Agreement must be presented within five (5) working days. This argument was based on the ordinary dictionary meaning of "grievance" as "grounds for complaint".

The employer argued that this interpretation was unusual. Their solicitor maintained that the dismissal was a form of discipline and that a grievance may or may not follow the act of disciplining but the two are not synonymous. Reference was also made to another article of the Collective Agreement which stated that the employer must, "without unreasonalbe delay" notify an employee who has been discharged the reasons for his dismissal. It was argued that this clause would not exist if the procedures for grievance were intended to cover dismissals. The solicitor for the employer cited another case decided by the Board in which the Board clearly distinquished between "grievance" and discipline taken by an employer.

AWARD: The Board endorsed the employer's interpretation of "grievance". The article in the Collective Agreement cited by the Union defined the roles of the participants in a grievance procedure, which occurs only when a party wishes to challenge an action taken, such as the disciplinary action in this case. The article does not refer to the preceding action, but only a resulting grievance. Therefore, the letters of dismissal were valid and the suspensions were upheld by the Board.

AUTHORITIES: The Canadian Brotherhood of Railway, Transport and General Workers Union, Local 606 and The Dartmouth General Hospital and Community Health Centre. (Arbitration Board chaired by Bruce Outhouse, 80-123)

DECISION: 82-43

Halifax Industries Limited AND Industrial Union of Marine and Shipbuilding Workers, Local 13

W. C. Kennettle, Arbitrator
February 24, 1982

ISSUE: Remedy for Missed Overtime Assignment 8:2100

DECISION: 82-43 (CONT'D)

CIRCUMSTANCES: The overtime provision in the Collective Agreement provided that employees may have equal opportunity, with certain other employees, to work overtime. The company admitted that in a number of cases when selecting employees for overtime, they had not met the requirements of the overtime provision. The Arbitrator was asked to establish an appropriate remedy for an individual employee whose overtime opportunity was overlooked.

AWARD: The Arbitrator ruled that the aggrieved employee is to be given the first available opportunity to work the overtime he missed and, regardless of the duration of the replacement overtime shift, the employee is to be paid an amount at least equal to the amount he would have earned on the overtime shift he missed.

AUTHORITIES: Re Canadian Johns Manville Co. Ltd., June 1971; Re Rothmans of Pall Mall Canada Ltd.; Re Canadian Johns Manville Co. Ltd., July 1973; Re Halifax Industries Ltd., Sept. 1981.

DECISION: 82-44

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

Innis Christie, Arbitrator

Ronald Pink, for the union
Reinhold Endres, for the employer
February 10, 1982

ISSUE: Overtime 8:2130; Company Rules 4:1500

CIRCUMSTANCES: The grievor, a forest technician with the Department of Lands and Forests, attended a Silviculture course at a forest ranger's school in Fredericton. His department paid the costs of attending the course. Two of the days spent attending the course were days that the grievor would otherwise have had off. The grievor now claims that he was entitled to be paid overtime for attending the course on the two days in question at the same rate to which he would have been entitled had he worked at his regular employment on those dates.

The employer argued that they did not consider the course mandatory; employees are free to turn down the opportunity of attending such a course. It also pointed to the Province of Nova Scotia's management manual, which stated that attendance at conferences cannot be considered to fall within the meaning of work, and hence, cannot be claimed as overtime. Since the grievor had attended the course on his scheduled days off, the employer had offered that his actual hours on the course during these scheduled days off should be replaced by time off, or the cash equivalent if time off was not possible. The grievor refused this offer.

AWARD: The grievance succeeds. The Abritrator categorized the issue as turning on whether the grievor went to the Fredericton course voluntarily, as the employer contended, or was required to go, as the grievor maintained. On the factural evidence before him, the Arbitrator held that the grievor was "required" to attend

DECISION: 82-44 (CONT'D)

the course. The Arbitrator then ruled that the grievor's attendance at the Fredericton course during his scheduled days off was "work" within the meaning of "overtime" in the Collective Agreement. The Arbitrator distinguished earlier authorities that had gave the other way on the facts: in the earlier authorities, the grievor's attendance at the training course was voluntary: in the present case, the grievor was required to attend the course.

AUTHORITIES: Re K.U.P. Co. Ltd. (1965), 16 L.A.C. 73; Brown and Beatty: Canadian Labour Arbitration, p. 419; Palmer, Collective Agreement Arbitration in Canada, p. 497; Re Toronto's Electric Commission (1968), 20 L.A.C. 19; Christie: Employment Law in Canada, p. 269; Re Dominion Stores (1978), 20 L.A.C. (2d) 118.

DECISION: 82-45

International Union of Elevator Constructors, Local 125 AND General Equipment Limited

Judge Nathan Green, Arbitrator

Garland Ingraham, for the union
Don Gillis, for the employer
June 14, 1982

ISSUE: Pension, Insurance and Welfare Plans 4:1400; Form and Content of the Collective Agreement - Ancillary Documents 4:1200; Jurisdiction of the Arbitrator - Specific Applications - Union Security Claims 2:1426; Union Rights - Union Security 9:1200, 8:3310

CIRCUMSTANCES: Because of a shortage of cash flow and the need to make trade commitments as they came due, the company had failed to deduct from each employee and to pay over to the union the union welfare, pensions and education dues as specified in the Collective Agreement. Both the union and the company were agreed in the amounts owing.

AWARD: The arbitrator suggested that the company provide the union with a demand promissory note in the amount agreed upon, to be paid over a period of the next three months, in equal instalments, on dates to be suggested by the company. The company would, in addition, meet current obligations for pensions, welfare, etc. The parties further agreed that the promissory note would carry no interest but if the union found in necessary to discount the note, any interest involved payable by the union because of the discounting and negotiation would be assumed and paid by the company.

DECISION: 82-46

Pilkington Glass Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Union, Local 927

Judge J. A. MacLellan, Arbitrator

Douglas Beuree, for the union
Eric Durnford, for the employer
June 21, 1982

ISSUE: Conflict of Interest 7:3330; Reasonableness of the Penalty 7:4300; Mitigating Factors 7:4400

CIRCUMSTANCES: The union grieved the discharge of the grievor. While on suspension because of a previous incident, the grievor did some work for a customer of the employer at a cut rate. The employer discovered this, and discharged the grievor immediately upon his return from suspension. At the time, the employer thought that the grievor had been doing glass work for the customer, which is the employer's normal business. At the hearing it was revealed that the bulk of the work had been plastic work, which the employer normally does not do.

AWARD: The grievance succeeds in part. A suspension of two and a half months is substituted for discharge. Although it was up to the company to decide if it wanted to do plastic work, it probably would not have done so. The grievor's conflict of interest was not as serious as it had seemed at first. However, the grievor's past record is such that future conflicts with management may justify discharge.

DECISION: 82-47

Sobeys Stores Limited AND United Food and Commercial Workers Union, Local 910

D. Merlin Nunn, Q.C., Arbitrator

Ronald A. Pink, for the union
R. B. MacDonald, Q.C., for the employer
June 24, 1982

ISSUE: Policy Grievances 2:3124; Time Limited 2:3128; Union Liability for an Unlawful Strike 9:2400; Damages 9:2500

CIRCUMSTANCES: This was a company grievance. It was agreed that there were no time limits for initiating company or union grievances, i.e. that the time limits in the collective agreement applied only to individual grievances. The company sought damages for illegal work stoppages at its retail stores. On October 4, 1981 union meetings were held to discuss support for striking warehousemen. On October 9 and 10, picket lines went up at the retail stores.

DECISION: 82-47 (CONT'D)

Few employees went to work on those days, and business was slow. The company estimated its loss of profits by comparisons with previous years and previous weeks. The union argued that no damages should be assessed because the precise loss had not been proved.

AWARD: The grievance succeeds. The evidence clearly discloses that the union was behind the setting up of the picket line and the consequential work stoppage. Damages were assessed, but at significantly lower than the company's estimate.

DECISION: 82-48

International Brotherhood of Electrical Workers, Local 625 AND Construction Association Management Labour Bureau Limited, on behalf of Dawcoelectric Limited.

Brian A. Langille, Arbitrator

Ronald A. Pink, for the union
Gregory I. North, for the employer
July 5, 1982

ISSUE: The Submission to Arbitration 2:1300; Discrimination 7:4414

CIRCUMSTANCES: The union grieved that the employer had not paid the grievor sufficient travel expenses, and that the grievor had been laid-off without just cause. The grievance concerning the travel expenses had been partially resolved in the grievor's favour during the grievance procedure. At the arbitration hearing the employer asserted that the extra travel expenses being claimed had not been claimed in the original grievance. The lay-off in question had occurred just after the grievance concerning the travel expenses had been partially resolved during the grievance procedure in the grievor's favour. The employer's explanation of the layoff was that the grievor's travel expenses made him too expensive an employee.

AWARD: The grievance succeeds in part. The employer is directed to pay the extra travel expenses. The grievance, if not read too technically, does include all elements of travel expenses. However, the lay-off was for economic reasons and not shown to have been discriminatory, and therefore within management's rights.

DECISION: 82-49

International Brotherhood of Electrical Workers, Local 625 AND The Construction Association Management Labour Bureau Limited, on behalf of Dawcoelectric Limited

Brian A. Langille, Arbitrator

Fern J. Tardif, for the union
Gregory I. North, for the employer
July 9, 1982

DECISION: 82-49 (CONT'D)

ISSUE: Call-In Pay 8:3400

CIRCUMSTANCES: The union grieved the failure of the employer to pay two hours reporting pay. On the day in question it was raining and windy. The employees waited for the weather to clear, and when it did not within two hours, went home. The foreman had come to make an enquiry, but did not direct the men to work. On previous rainy days when the employees had acted in this way, they received the two hour reporting pay. However, the employer took the position that there was indoor work available in the machine house, such as had been done on the previous day during the rain, and that the men were therefore not eligible for pay without having worked.

AWARD: The grievance succeeds. The employees reasonably concluded that they were eligible for reporting pay. Although work in the machine house may have theoretically been available, the employer had not done enough to "provide" work.

DECISION: 82-50

Scotian Crewing & Supply Services Limited AND Canadian Merchant Service Guild

Innis Christie, Arbitrator

Charles Robinson, for the union
Eric Durnford, for the employer
June 24, 1982

ISSUE: Premium Rates and Bonuses 8:2000; Damages 2:1410

CIRCUMSTANCES: This was a Guild grievance concerning the payment for "lay days" in the first half of February, 1982. Lay days are paid days off earned after sea days have been worked. The current collective agreement was retroactive to February 1, 1982. The company paid for the lay days for early February 1982 at the old rate, on the basis that these lay days had been earned by virtue of sea days worked in January, i.e. under the old collective agreement. The Guild claimed that the new rates were applicable.

AWARD: The grievance succeeds. The wording of the new agreement is that lay days after February 1 are to be paid at the new rate. The fact that lay days are only paid for after they elapse supports this conclusion. The company's attempt to draw an analogy with vacation pay is not apt.

DECISION: 82-51

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

Nova Scotia Supreme Court, Trial Division
Mr. Justice Lorne Clarke

DECISION: 82-51 (CONT'D)

Ronald A. Pink, for the union
Reinhold Endres, for the employer
April 21, 1982

ISSUE: Judicial Review 1:5000; Jurisdictional Error 1:5300; The Submission to Arbitration 2:1300; Job Posting 6:2310

CIRCUMSTANCES: The employer applied to the Supreme Court to set aside an arbitration award. The original grievances concerned a job posting dispute. Two unsuccessful applicants for a position grieved a violation of article 39, each requesting that she be given the job. At arbitration both grievances were heard together, and the relief sought was a new competition. Article 39.02 contained the seniority rights re promotions; article 39.01 contained the posting procedures. At the hearing, to the surprise of both counsel, it became evident that the job posting had not been as extensive as required. The arbitrator concluded that the grievance of a violation of article 39 was broad enough to cover the posting procedure and ordered a new competition on the basis that the job posting provisions of the collective agreement had been violated.

AWARD: The arbitration award is set aside. The grievances on their face do not complain about the job posting procedure. This matter is a fresh dispute, and therefore not properly the subject of an amendment. In deciding the grievances on the basis of article 39.01 the arbitrator misonducted himself and exceeded his jurisdiction by failing to decide all matters referred to him, i.e. the dispute re article 39.02.

DECISION: 82-52

The Halifax Infirmary AND Nova Scotia Nurses' Union

Nova Scotia Supreme Court, Trial Division
MR. Justice Richard

David Reynolds, for the union
Eric Durnford, for the employer
April 30, 1982

ISSUE: Judicial Review 1:5000; Company Rules 4:1500; Medical Examinations 7:3230; Organization and direction of the workforce 5:0000

CIRCUMSTANCES: The employer applied to the Supreme Court for an order to set aside a majority arbitration award 82-25. The original grievance concerned a decision by the employer to deny the grievor paid sick leave after the grievor failed to submit to a medical examination by the hospital in addition to that by her own doctor. The personnel policy, which was not part of the collective agreement, gave the employer the right to require an examination by the hospital. The majority award had held that this rule was unreasonable, and hence not enforceable as a unilaterally imposed management rule under the standard sixfold test set out in Re: K.V.P. (1965), 16 L.A.C. 73 (Robinson).

DECISION: 82-52 (CONT'D)

AWARD: The majority award is set aside. The management rights clause, which gives management the exclusive rights to direct the workforce, is not subject to a test of reasonableness, citing Re: Metropolitan Toronto Board of Commissioners of Police (1981), 124 D.L.R. (3d) 684 (Ont. C.A.).

DECISION: 82-53

Nova Scotia Government Employees Union AND Nova Scotia Civil Service Commission

S. Bruce Outhouse, Chairman; Linda Gallant and Matthew MacPherson

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
January 18, 1982

ISSUE: Discharge Distinguished from Resignation 7:7100

CIRCUMSTANCES: The issue was whether or not the grievor had quit. The grievor had been told to conduct performance evaluations to fill a job vacancy, and became very upset at the prospect of having to do this. On a Friday morning she tendered a written resignation, and left work immediately. At a meeting on the following Monday afternoon, also attended by a union representative, the grievor attempted to withdraw her resignation. The employer refused to accept the withdrawal.

AWARD: The grievor is reinstated without loss of seniority. Given the grievor's emotional state, her resignation should not be treated as binding. However, since she was the author of her own misfortune, no compensation for lost pay or benefits is awarded.

DECISION: 82-54

International Union of Bricklayers and Allied Craftsmen AND Buchanan Masonry Limited

Brian Langille, Arbitrator

Ronald Pink, for the union
July 12, 1982

ISSUE: Pension, Insurance and Welfare Plans 4:1400

CIRCUMSTANCES: In an earlier award (82-06) the arbitrator had found that the employer was bound by the collective agreement to pay to the health and welfare fund, the masonry promotion fund, the pension fund, union dues, and initiation fees. In the earlier award the quantum of damages was not determined, the arbitrator retaining jurisdiction in the event of the failure of the parties to

DECISION: 82-54 (CONT'D)

agree. The parties did fail to agree, and the employer refused to attend the resumption of the hearing. The union's counsel testified as to his calculation of damages owing, including legal fees which were claimable against the employer under the terms of the collective agreement.

AWARD: The damages were set at the level submitted on behalf of the union.

DECISION: 82-55

International Association of Carpenters and Joiners, Local 1588 AND Reeves Modular Homes Limited

S. Bruce Outhouse, Arbitrator

Gerald McConnell, for the union
Irving Warner, for the employer
July 21, 1982

ISSUE: The Collective Agreement 2:1200; Statutes 2:2100

CIRCUMSTANCES: The union sought a declaration that the employer was bound by the collective agreement with the acredited employers' organization when it engaged in commercial work. The employer is unionized. The employer's business consists of the construction of modular units in its plant and a limited amount of finishing on site. The bulk of the employer's business is the construction of residential home units, but recently it has been involved in apartment and motel construction. The union led evidence concerning a particular apartment project during which the employer abided by its own collective agreement with the union, not the collective agreement with the accredited employers' organization.

AWARD: The grievance succeeds. It is declared that by virtue of the construction industry provisions of the Trade Union Act, the employer is bound by the collective agreement with the accredited employers' organization when it engages in commercial work, which apartment and motel construction clearly is. Practical difficulties cannot override the Act.

DECISION: 82-56

The Halifax Infirmary Local of the Nova Scotia Nurses Union, AND The Board of Directors of the Halifax Infirmary Hospital

S. Bruce Outhouse, Chairman; Raymond F. Larkin, Donald H. McDougall

David P. Reynolds, for the union
Eric B. Durnford, for the employer
June 17, 1982

DECISION: 82-56 (CONT'D)

ISSUE: Defining the Bargaining Unit 5:1100; Onus or Burden of Proof 3:2400

CIRCUMSTANCES: The union grieved that the employer had breached the recognition clause and the union dues check off clause. The employer had created two new positions, called group leaders, and appointed two members of the bargaining unit to these positions. Two additional persons were hired into the bargaining unit as replacements. The employer stopped deducting union dues on the basis that they were excluded by the recognition clause, which incorporated the management exclusions of the Trade Union Act. The union disagreed. The parties agreed that the arbitration board should decide this issue, instead of their taking the matter to the Labour Relations Board. There was a dispute about who bore the onus.

AWARD: The grievance is dismissed. The employer bears the onus to prove that an exclusion applies. The group leaders are management within the meaning of the Trade Union Act, especially because of their co-ordination, supervisory, discipline and evaluation functions.

DECISION: 82-57

United Steelworkers of America, Local 4122, AND Robb Engineering

S. Bruce Outhouse, Arbitrator

Robert J. Young, for the union
John P. Merrick, for the employer
July 23, 1982

ISSUE: Preliminary Objections 3:2100; Waiver of procedural irregularities 2:3130; Limits to arbitrability apart from the collective agreement 2:3200; Pension, Insurance and Welfare Plans 4:1400

CIRCUMSTANCES: The arbitration concerned two grievances. One was a union grievance taken in respect of a deceased employee. At the hearing the employer raised, for the first time, a preliminary objection to the form of the grievance. The second was an individual grievance concerning dismemberment benefits under the collective agreement arising from a work related injury. The employer raised a preliminary objection that the Workmen's Compensation Act, which stipulates that Workmen's Compensation benefits are in lieu of actions against employers, made the grievance inarbitrable.

Both grievances concerned group insurance benefits. The collective agreement required the employer to provide certain benefits, clearly contemplating the purchase of an insurance policy, but not incorporating the policy into the agreement. The two grievances raised the same issue. In both cases insurance benefits were denied because of limitations in the insurance policy not expressed in the collective agreement. The union had never before complained of the policy restrictions.

DECISION: 82-57 (CONT'D)

AWARD: The preliminary objections were dismissed. The employer must be taken to have waived its objection to the form of the union grievance by its failure to raise the matter earlier. The Workmen's Compensation Act's removal of the right of "actions" against employers does not apply to grievances or to collective agreements.

On the merits, both grievances were dismissed. The agreement clearly contemplated the purchase of an insurance policy, and the limitations were reasonable and normal. They were not inconsistent with the collective agreement.

DECISION: 82-58

Halifax Civic Workers Union, Local 108, AND City of Halifax

Innis Christie, Chairman; Joe Ross, Eric Durnford

Bruce Evans, for the union
Gerry Goneau, for the employer
July 22, 1982

ISSUE: Issue estoppel 2:3220; Promissory Estoppel 2:2200; preliminary objections 3:2100; contracting out 5:1300; Overtime - Voluntary or compulsory 5:3210; Allocation of Overtime within the group 5:3224; Refusal to work overtime 7:3630; Strikes and Lockouts 9:2100; Discipline 7:0000

CIRCUMSTANCES: The arbitration concerned sixty-six separate grievances. During the 1970's the city had streamlined it's garbage collection system based on an incentive system. The incentive was that employees were paid for an eight hour shift, but could leave as soon as the work was completed. The average completion time was 2:30 whereas the shift ended at 5:00. At the end of 1981, without prior consultation with the union, the city reduced the number of crews from nine to seven. The city expected that this would result in an average completion time of 3:30, but overlooked several relevant factors in its calculations.

When the seven crew system started the garbage was not fully collected by 5:00. This was in part due to a work to rule and slowdown by the garbagemen and in part due to the inherent consequences of a reduction to seven crews. Initially, the garbagemen worked overtime, but after a few days refused overtime unless all seven crews were assured of overtime. The overtime provision read, "except as specified elsewhere, whenever possible overtime shall be on a voluntary basis". The city did not attempt to get other eligible employees to work overtime. Instead, the city responded by contracting out the garbage collective not completed by 5:00. Also, the garbagemen were refused snow removal overtime to which they had been ordinarily entitled. The next development was that the garbagemen were given direct orders to complete work by 5:00, and to work overtime if not finished. The work was not finished by 5:00 and the men refused overtime. Disciplinary suspensions were imposed for violation of both orders. On subsequent days the same orders were given with the same results. Longer suspensions were imposed for defiance of the order to complete work by 5:00 (i.e. no mention of refusal of overtime). The overtime work was contracted out.

DECISION: 82-58 (CONT'D)

The union grieved:

- that the disciplinary suspensions for failure to finish work by 5:00 were imposed without just cause.
- that the disciplinary suspensions for refusing overtime were imposed without just cause.
- that the garbagemen were improperly denied snow removal overtime.
- that overtime had been unequally distributed.
- that the city had improperly contracted out.

The city grieved:

- that the union breached the no strike clause.

The city raised a plea of res judicata or issue estoppel against the union's grievances because there had previously been a dispute arising from the reduction of crews which the union had abandoned. The city also pleaded that by refusing garbage collection overtime, the union was estopped from alleging improper denial of snow removel overtime.

AWARD: The city's preliminary objections are dismissed. The previous dispute was not similar enough for a plea of res judicata to succeed. The plea of estoppel re overtime was not properly a preliminary objection but rather an argument on the merits.

The union's grievances against disciplinary suspensions for failure to finish by 5:00 are allowed and compensation ordered. The city was unable to prove specific misconduct by particular employees to justify discipline.

The union's grievances against disciplinary suspensions for failure to work overtime are allowed and compensation ordered. Since the city had not exhausted the possibilities of getting voluntary overtime from other workers, overtime by the garbagemen was not mandatory by the terms of the collective agreement.

The union's grievance concerning denial of snow removal overtime is allowed and compensation awarded to two specifically affected employees. Since overtime is voluntary, the men were free to choose snow removal overtime and refuse garbage collection overtime. Estoppel does not apply.

The union's grievance concerning unequal distribution of overtime is denied. Denial to all is not unequal distribution.

The union's grievance concerning the city's contracting out is denied. There are no collective agreement limitations on the city's right to contract out, and bad faith on the part of the city had not been shown.

The city's grievance of a breach of the no-strike clause is allowed. A work to rule or slowdown does constitute a strike. The board did not, however, determine the extent to which the city's extra costs (re contracting out) were caused by the slowdown as opposed to the inevitable result of a reduction in crews. The board retained jurisdiction to decide the matter.

DECISION: 82-58 (CONT'D)

The board emphasised that the real solutions to the problems could only come from co-operation outside the specific terms of the collective agreement.

DECISION: 82-59

Industrial Union of Marine and Shipbuilding Workers, Local 13, AND Halifax Industries Limited, Dartmouth Marine Slips

W.C. Kennette, Arbitrator

Mr. Hubley, for the union
James Graham, for the employer
July 27, 1982

ISSUE: Allocations of Overtime within the Group 5:3224

CIRCUMSTANCES: The arbitration concerned a policy grievance concerning the interpretation of a collective agreement provision stipulating that "Employees working on the job have preferences on overtime". The union sought a declaration that the first man on the job had the first right to overtime.

AWARD: The particular declaration sought by the union was not granted. It was declared that a person performing a specific task had the first right to overtime. If there was insufficient overtime work to do this, an effort should be made to effect equal distribution. If a special skill is required, if possible a qualified person who had worked on that specific task should be given the first right to overtime.

DECISION: 82-60

Industrial Union of Marine and Shipbuilding Workers, Local 13, AND Halifax Industries Limited, Dartmouth Marine Slips

W. C. Kennette, Arbitrator

Mr. Hubley, for the union
James Graham, for the employer
July 27, 1982

ISSUE: Scheduling Work, Work Hours and Shifts 5:3100

CIRCUMSTANCES: The arbitration concerned a union policy grievance respecting the employer's use of the second regular shift at times when other workers were on overtime. The union identified problems arising from workers on different rates working side by side.

DECISION: 82-60 (CONT'D)

AWARD: The collective agreement gives the employer the right, in its discretion, to schedule the second shift. Employees on regular shift cannot refuse to work along side employees on overtime. Employees on shift required to directly service an employee on overtime should be paid the overtime rate for such work, for a minimum of one hour.

DECISION: 82-61

United Steelworkers of America, Local 4253, AND Hawker Siddeley Canada Inc.

F. B. William Kelly, Arbitrator

Winston Ruck, for the union
John Hawaston, for the employer
July 28, 1982

ISSUE: Seniority - the Skill and Ability Requirement 6:3000; The Scope of Arbitral Review 6:3100; Trial, Training and Familiarization Periods 6:3230

CIRCUMSTANCES: The grievor was bumped out of his job and sought to bump a less senior employee. He was denied the opportunity to do this on the basis that he did not have the skills to perform the particular job of the less senior employee, although the two had the same job classification. The grievor complained that his lack of competence arose because he had not been provided with the training he had been promised. Considerable training would have been required, i.e. more than a familiarization period.

AWARD: The grievance is dismissed. There was no obligation in the collective agreement for the employer to train the grievor. The employer's decision re skill and ability should not be interfered with unless the employee shows that the employer acted arbitrarily, with discrimination, bad faith, or unreasonably. This had not been shown.

DECISION: 82-62

Retail, Wholesale and Department Store Union, Local 1015, AND Associated Freezers of Canada Limited

S. Bruce Outhouse, Arbitrator

Gregory I. North, for the union
Brian Johnson, for the employer
August 2, 1982

ISSUE: Notice of Lay-off 6:2320

DECISION: 82-62 (CONT'D)

CIRCUMSTANCES: By virtue of the collective agreement, the three grievors were entitled to two weeks notice of lay-off, or pay in lieu. On January 6 the grievors were given notice that they were to be laid off effective January 20. This was replaced with a notice given on January 21 which said their lay-off was effective February 5. However, they were called to work the next working day after February 5 and worked until February 19. On that date they were told they were on lay-off effective the next working day. They were given no pay in lieu of notice. They were recalled eight working days later. The union claimed two weeks pay in lieu of notice. The employer contended that the January 21 notice fulfilled the notice requirement.

AWARD: The grievance succeeds to the extent of compensation for eight days lost pay, the actual loss suffered. Since the grievors continued to work after February 5, the January 21 lay-off notice must be taken to have lapsed. A lay-off notice with an indeterminate date of lay-off does not comply with the notice requirement.

DECISION: 82-63

Amalgamated Transit Union, Local 508, AND Metropolitan Transit Commission

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
D. Merlin Nunn, Q.C., for the employer
August 3, 1982

ISSUE: Innocent Absenteeism 7:3210; Onus 7:3250; Discrimination 7:4414

CIRCUMSTANCES: The grievor was discharged for innocent absenteeism. There were numerous causes of his past absenteeism. His recent attendance record had shown an improvement. The grievor had not exhausted his sick leave credits. The grievor's record of absenteeism was not as extensive as that of some other employees.

AWARD: The grievance is allowed and the grievor reinstated. Innocent absenteeism requires proof of undue absenteeism in the past and probability of continuation in the future. The arbitrator leaned forward the position that the onus of showing no probability of future attendance problems rested with the employee. However, it was not necessary to decide this point in this case because the grievor's past absenteeism was not serious enough to justify discharge.

DECISION: 82-64

The Nova Scotia Nurses Union, AND Northside General Hospital

S. Bruce Outhouse, Chairman; Gerald J. McConnell, Donald H. McDougall

Gregory I. North, for the union
Eric B. Durnford, for the employer
July 30, 1982

ISSUE: Change of Position 3:2200; Lay-off 6:2200

CIRCUMSTANCES: During a legal strike by another union, the nurses honoured the picket line, ignoring the advice of their union. The union conceded that this was an illegal workstoppage. After the strike was over, the recall of the nurses was not according to bargaining unit seniority which the collective agreement requires for recall from lay-off. During the grievance procedure the employer contended that skill and ability considerations justified its order of recall. The day before the hearing the employer abandoned this argument and relied instead on the contention that there was no lay-off. The union agreed that the nurses were not on lay-off during the illegal workstoppage, but argued that after the end of the strike they acquired lay-off status.

AWARD: The grievance is dismissed. The employer's change of reasons did not prejudice the union. Unless the collective agreement clearly says so, workers are not on lay-off after an illegal workstoppage. Since there was no lay-off, the provisions concerning recall by seniority from lay-off did not apply.

DECISION: 82-65

Retail, Wholesale and Department Store Union, Local 596 AND Rahey's Supermarket

N. M. Scaravelli, Arbitrator

John B. Campbell, E. Rose Mary Tobin and George Rahey, for the union
H. S. Nathanson, Bernard Leviten and D. J. Rahey, for the employer
August 6, 1982

ISSUE: Assignment of Bargaining Unit Work to Non-employees: Contracting Out (5:1300); Assignment of Work Outside the Bargaining Unit - Unit Definition in Terms of Employees: Employee Defined (5:1122)

CIRCUMSTANCES: The grievor was informed at the time that she was hired as a donut maker in the store that she would not be part of the Union although no explanation was given. When she applied for Union membership, she was told that she was not a store employee.

DECISION: 82-65 (CONT'D)

The Company stated that the space occupied by the donut operation was rented by an independent operator and that the grievor was employed by him. The fact that her cheque was issued originally by the store was merely a matter of convenience. After her application to the Union the pay was in cash to accenuate this.

AWARD: The grievance succeeds. The Arbitrator found that the independent operator of the donut operation was also the President, majority shareholder and controlling voter of the wholesale company owning the supermarket. Therefore the grievor was a "defacto" employee of the Company. The rental arrangement with the donut operation was to subvert the Collective Agreement so that the employee of the operation would receive only minimum wage.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 181

DECISION: 82-66

The Halifax Local Union No. 56, United Association of Journeymen and Apprentices of the Plumbing, Steamfitting and Pipefitting Industry of United States and Canada AND Murphy & Wharton (1978) Limited

S. Bruce Outhouse, Arbitrator

Bruce MacDonald, for the union
George Rowsell, for the employer
August 12, 1982

ISSUE: Form and Content of the Collective Agreement - Essentials of the Collective Agreement 4:1100; Union Rights - Union Security 9:1200; Assignment of Work Outside the Bargaining Unit - Assignment of Bargaining Unit Work to Non-unit Employees 5:1400

CIRCUMSTANCES: The Construction Association Management Labour Bureau Limited was accredited by the Construction Industry Panel of the Labour Relations Board as the sole collective bargaining agent for all unionized employers in the industrial and commercial sector of the construction industry in mainland Nova Scotia. The Union entered into an agreement with the Bureau recognizing it as the sole collective bargaining agent for its designated members.

Although the involvement of the Employer in the industrial and commercial sector was very limited, the extent of its involvement in that area qualified it as a unionized employer under the Act and its bargaining rights in that sector accrued to the Bureau. However, no collective agreement had been negotiated between the Union and the Employer, the Union taking the position that once it obtained the certification order, the Employer was automatically bound in all respects by the terms of the Bureau agreement. The Employer was not, nor had ever been, a member of the Bureau. However, the Union argued that by paying the wage rates, union dues and other benefits called for in the Bureau agreement, it indicated an acceptance of that agreement.

DECISION: 82-66 (CONT'D)

The Union alleged that the Employer had violated the Bureau agreement by dismissing an employee without just cause, by failing to remit Union dues and welfare and pension benefits for two of its employees and by refusing to replace a non-member of the Union with a Union apprentice.

AWARD: The Arbitrator found that the Bureau agreement bound the Employer in the industrial and commercial sectors only. A collective agreement cannot be founded upon past practice or estoppel. Because no written agreement between the Union existed, the Employer was not bound outside this sector.

Considering the circumstances the Arbitrator agreed that the dismissal was unfair labour practice since the employer was dismissed when he would not agree to resign from the Union. However, as an Arbitrator he did not have the necessary jurisdiction to deal with an unfair labour practice.

The employees for whom no Union dues were remitted were not members of the Union. However, under the Bureau agreement, the Employer was required to hire men who were Union members. If these are not available, the men hired must be willing to become Union members within three months, during which time the Employer must pay dues. Therefore the Union would receive dues from all employes working in the commercial and industrial sectors. Where the two employees in question were employed on jobs in that sector, the Arbitrator ruled that the Union was entitled to compensation.

The Arbitrator reiterated that because of the lack of a collective agreement, the Union could not dictate that Union members he hired in residential work. Where the non-union employee was employed on a commercial or industrial job, the Union could compel his replacement by a qualified Union member.

AUTHORITIES: Local Union No. 625, International Brotherhood of Electrical Workers and Fairview Electric Limited (January 29, 1980, 80-48)

DECISION: 82-67

Maritime Beverages Limited AND Retail, Wholesale and Department Store Union, Local 1015

R. Lorne MacDougall, Chairman; Gerald J. McConnell and Donald H. McDougall

Eric B. Durnford, Andre Rousseau and Keith Murdock, for the employer
Gregory I. North, Anthony Capman, Ken Hennick and Tim Ward, for the union
July 5, 1982

ISSUE: Premium Rates and Bonuses - Weekly Overtime 8:2120; Premium Rates and Bonuses - Overtime 8:2100; Interpretation of Collective Agreement - The Object of Construction: Intention of the Parties 4:2100

DECISION: 82-67 (CONT'D)

CIRCUMSTANCES: The grievors argued that they should be paid overtime for working on Thursday, December 31, 1981. This was based on the calculation of the pay week which ran from Friday to Thursday and which had the preceding week included the statutory holiday of Boxing Day, falling on Saturday, for which all employees were paid since under the terms of the Collective Agreement statutory holidays falling on any day of the week was considered a day worked.

The grievors consisted of three groups - Plant Employees, Sales Persons and Vending Service Men. The Sales Persons, under the terms of the Collective Agreement, were entitled to overtime pay on Saturday and Sunday. By custom, the Vending Service Men were treated the same as the Sales Persons with regard to overtime. The Collective Agreement provided for overtime for Plant Personnel only if work was performed beyond the eight-hour daily shift. Overtime was not allowed for outside this content of shift.

AWARD: The Board did not find that the grievors were entitled or eligible, under the present Agreement, to overtime for December 31. However they found that the Sales Employees and Vendor Service Men were entitled to be paid the overtime rate for Saturday, December 26, 1981. The Plant Employees were entitled to no overtime rate.

AUTHORITIES: Re Canada Packers Ltd. and Canadian Food and Allied Workers, Local P417 (1974) 9 L.A.C. (2d) 11; Re International Union of Operating Engineers, Local 772, and Columbian Carbon (Canada) Ltd. (1970) 21 L.A.C. 367; Re Retail, Wholesale Bakery Workers' Union, Local 461 and Weston Bakeries Ltd. (1967) 18 L.A.C. 185; Brown and Beatty: Canadian Labour Arbitration, p. 416

DECISION: 82-68

Nova Scotia Government Employees Union AND Civil Service Commission of the Province of Nova Scotia

John P. Merrick, Arbitrator

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
August 11, 1982

ISSUE: Application of Seniority - Promotion, Demotion and Transfer 6:2100; Seniority - The Skill and Ability Requirement - The Scope of Arbitral Review 6:3100; Seniority - The Skill and Ability Requirement 6:3000

DECISION: 82-68 (CONT'D)

CIRCUMSTANCES: The grievor grieved when the position (a promotion) for which he had applied was given to an applicant with less seniority. His grievance was based on the article of the Collective Agreement which stated preference in filling a vacancy should be given to the applicant with the greatest length of service when two applicants were considered by the Employer to be of equal merit.

The position in dispute was filled solely on the basis of an interview conducted by a panel of three. The grievor felt that this panel did not adequately ascertain all his qualifications or give adequate consideration to his experience and training. Therefore, the successful applicant had scored higher.

AWARD: The grievance fails. Although the Arbitrator was not satisfied with the selection procedure used, he did not find that this constituted "unreasonableness" or "unfairness" on the part of the Employer.

AUTHORITIES: Nova Scotia Government Employees Union (Outhouse) and Civil Service Commission of Nova Scotia (dated May 27, 1981); Re: United Brewer Workers, Local 173, and Carling Breweries Ltd. (1968), 19 L.A.C. 110; Re: U.A.W., Local 707 and Ford Motor Co. of Canada Ltd. (1970) 21 L.A.C. 61; Nova Scotia Government Employees Union (Keefe) and Civil Service Commission of Nova Scotia (dated October 5, 1981, 81-122); Re: United Mine Workers of America, Local 13031, et al (1948) 1 L.A.C. 234

DECISION: 82-69

Dalhousie Faculty Association AND Board of Governors of Dalhousie College and University

Innis Christie, Arbitrator

Howard Epstein, for the union
Eric Durnford, for the employer
July 16, 1982

ISSUE: Assignment of Work Outside the Bargaining Unit - Unit Definition in Terms of Employees - Temporary, Casual and Part-Time Employees 5:1124; Primary Sources of Jurisdiction - Individual Contracts of Employment 2:1210; Assignment of Work Outside the Bargaining Unit - Defining the Bargaining Unit 5:1100; Distribution of Work Within the Bargaining Unit - Changes in Job Function 5:2410; Admissibility of Evidence - The Basic Principle: Relevance 3:4200

CIRCUMSTANCES: The Association grieved that two part-time teachers in the Department of French were members of the Bargaining Unit during the academic year in question and that the University therefore breached the Collective Agreement by failing to deduct regular Union dues from their monthly salaries.

The Association argued that the University had agreed in the pre-certification agreement that any faculty member who taught one and one-half courses would be

DECISION: 82-69 (CONT'D)

treated as members of the Bargaining Unit for the purposes of the certification vote and therefore the same criteria existed when considering inclusion in the now existing Unit. Counsel for the University argued that only after the Collective Agreement was drawn up was there a clear definition of the responsibilities of full-time and part-time faculty so that this no longer applied. They objected that such evidence be introduced since the Collective Agreement, by referring to the Labour Relations Board Certificate, makes clear that only employees whose duties and responsibilities are 50% or more of full-time employees were members of the Unit.

In the copies of "Staff Employment and Change Form" received by the part-time teachers it was stated that the responsibilities would be 25% and 35%, respectively, of the work load of a full-time faculty member. The Association presented evidence to show that each had in fact carried 50% of a full-time load and that this excess should be taken into account.

AWARD: The grievance fails. The Arbitrator found that the definition of "duties and responsibilities" of a full-time faculty member was ambiguous since it is difficult to balance the relative importance of teaching, scholarly research, professional responsibilities outside the University and involvement in academic administration. Therefore the pre-certification evidence was ruled admissible. However the Arbitrator did not find that the Association had discharged the onus of showing that the pre-certification criteria of teaching one and one-half courses was intended to be used for purposes beyond arbitration.

The Arbitrator also found that the legal agreement between the University and the part-time teachers, as stated in the letter of appointment, specified an appointment constituting "less than 50% of a full-time appointment". Therefore, any involvement above the specified percentages were to be viewed as unauthorized and therefore voluntary. Thus, the teachers were not "de facto" members of the Bargaining Unit.

AUTHORITIES: R. v. Barbour et al. ex parte Warehousemen and Miscellaneous Drivers Union Local 419 (1968), 68 D.L.R. (2d) 682 (Ont. C.A.); Canadian Kodak Co. Ltd. (1968), 19 L.A.C. 100 (Weatherill, chairman); Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Inc.) (1968), 3 D.L.R. (3d) 161 (Ont. H.C.); Alliance Canners Ltd. (1978), 17 L.A.C. (2d) 370 (S.B. Linden, Chairman)

DECISION: 82-70

Public Service Alliance of Canada AND Camp Hill Hospital

S. Bruce Outhouse, Chairman; Tom Patterson and Donald McDougall

Derek Dagger, for the union
Eric Durnford, for the employer
August 11, 1982

DECISION: 82-70 (CONT'D)

ISSUE: Preliminary Objection 3:2100; Term and Termination 4:1620; Retroactivity 4:1610; Promisory Estoppel 3:2200; Individual Contracts of Employment 2:1210; The Statutory Requirement 2:1100

CIRCUMSTANCES: The company raised a preliminary objection that the grievances were inarbitrable on the basis that no collective agreement was in force on the date the grievences arose.

The old collective agreement had expired on March 31, 1981. (The old agreement allowed individuals to control individual grievances). The conciliation officer filed his report on July 24, 1981; the requirements of section 45 were met on or about August 7, 1981. The union gave notice on September 18, 1981 of its intention to strike on or after September 20, 1981. Also on September 18, 1981 the employer cancelled all vacations. On September 21, 1981 the union commenced a strike. On September 22, 1981 the strike was declared illegal because the employer was the crown and the requisite 30 days notice had not been given. On September 24 the employer issued a memo saying the old agreement was still in effect. The new collective agreement, signed on November 10, 1981, and was retroactive to April 1, 1981.

The two individual grievors had had scheduled vacations from September 21 to October 2. They did not report to work from September 21 to 24. On September 24 both grievors were suspended for failing to report to work after their vacations had been cancelled. The two individuals filed grievances and the union also filed its own grievance. The employer did not raise any objections to arbitrability until a week before the hearing. The union claimed the employer was estopped from denying the existance of a collective agreement because of its September 24 memo. The employer conceded that the board had jurisdiction to determine whether it had jurisdiction to hear the merits.

AWARD: The preliminary objection fails. The union's estoppel argument fails. Basing a claim on the employer's September 24, 1981 memo that the old agreement was still in effect would be using estoppel as a sword.

The new collective agreement, since it was retroactive to April 1, 1981, makes all three grievances arbitrable. Grievance procedures can be retroactively put into effect.

Also, in the alternative, the individual grievances were arbitrable under individual contracts of employment. The old agreement expired on or about August 7, and thereafter individual contracts of employment were in effect. Since the old agreement gave individuals control of individual grievances, the grievance procedure was incorporated into individual contracts of employment. The lack of earlier objection by the employer meant the employer had not exerted its right to remove these from the individual contract of employment. However, the union grievance was not arbitrable under any individual contract of employment.

The arbitrability of the individual grievances under the new agreement supercedes any argument about individual contracts of employment.

DECISION: 82-71

Richmond District School Board AND Canadian Union of Public Employees, Local 1069

Simon J. MacDonald, Arbitrator

Gerald Yetman, for the union
David Samson, for the employer
April 29, 1982 (date of hearing)

ISSUE: Time Limits 2:3128; Group Grievances 2:3126; Waiver of Procedural Irregularities 2:3130; Extrinsic Evidence 3:4400; Negotiating History 3:4420; Past Practice 3:4430; Entitlement to Wages 8:1000; Preliminary Objection 3:2100; Wage Guarantees 8:1200

CIRCUMSTANCES: The arbitration concerned grievances by all cateteria workers that they had not been paid for five storm days. The determination depends on the interpretation to be given to the collective agreement provision which said that employees would "normally" work 195 days a year. The union led evidence to say that "normally" excluded days lost due to strikes or grease fires, but not storm days. The union also led evidence of past practice of payment for storm days.

The company raised a preliminary objection that the failure to pay for the first storm day had not been grieved within seven days. There was a provision that group grievances could by-pass the early stages of the grievance procedure which contained the seven day time limit. The company had not previously raised the time limit problem.

AWARD: The grievance succeeds. This is a group grievance which by-passes the time limit provisions. Also, the employer, by its conduct, has waived any objections re time limits. The collective agreement is ambiguous, and the extrinsic evidence favours the union's interpretation.

DECISION: 82-72

United Food and Commercial Workers, Local 1973 AND Sobey's Stores, Port Hawkesbury

Frank Elman, Q.C., Arbitrator

Ronald Pink, for the union
Robert MacDonald, for the employer
August 18, 1982

ISSUE: Revision of Classification and Rate 5:2440

CIRCUMSTANCES: The arbitration concerned three grievances regarding proper job classifications. They arose out of the introduction of a bake-off at the store. Grievor PM was classified as a non-food clerk. Her new duties were to run the bake-off. A bake-off uses pre-prepared mixes. Grievor PM did all the ordering, decided what to make, and supervised other employees. The union suggested she be

DECISION: 82-72 (CONT'D)

classified as a head baker, a baker, or an assistant baker. A baker tradionally prepares his or her own mixes.

Grievor MK was classified as a canteen clerk. Her new duties involved working in the bake-off under the supervision of PM.

Grievor SM was classified as part-time. She worked 21 hours per week. She spent more than half of her time decorating. She sought to be classified as a decorator.

The collective agreement provided that the union and the employer should agree on any new classification.

AWARD: The grievances of PM and MK succeed in part. Both are improperly classified. However, neither fits into an existing classification. The arbitrator has no authority to create a new classification, that is a matter for agreement between the parties. The parties are directed to agree. That agreement will entitle the two grievors to retroactive pay adjustments.

The grievance of SM fails. Decorating is not the main thrust of her job. She is properly classified as part-time.

DECISION: 82-73

United Food and Commercial Workers, Local 1973 AND Sobey's Stores

F. B. William Kelly, Sole arbitrator

Ronald Pink, for the union
R. B. MacDonald, for the employer
August 24, 1982

ISSUE: Distribution of work within the bargaining unit - Express provisions in the agreement 5:2200

CIRCUMSTANCES: The two grievors were reduced from full-time to part-time status. They grieved under an article which said that no combination of part-timers would be used to replace full-time employees. The evidence showed that grievor IM could have been scheduled for the full 40 hours per week since the time she had been put on part-time status. The other grievor, DC, could have been scheduled for slightly less than 40 hours per week during this period. These conclusions were reached on the basis of the weekly schedules.

AWARD: The grievance of IM succeeds and she is reinstated to full-time status effective the date she had been placed on part-time status. The evidence showed that part-timers were used to fill her full-time position.

The grievance of DC is dismissed. It has not been proved that he could have been scheduled for full-time work.

DECISION: 82-74

Dalhousie University AND Dalhousie Staff Association

R. Lorne MacDougall, Q.C., Chairman; Gregory North, A.K. Cunningham

Eric Durnford, for the employer
Gerald McConnell, for the union
August 11, 1982

ISSUE: Entitlement to Wages 8:1200

CIRCUMSTANCES: The grievor had been in the highest step of a particular classification. She was transferred to lower classifications, and her salary red circled. Eventually, the lower classification caught up to her red circled salary. Following its normal practice, the employer slotted her into the step just above her red circled salary, which was the second highest step in that classification. The union claimed she should have been slotted into the highest step of her classification.

AWARD: The grievance is dismissed. There is no requirement that the employer slot a red circled employee into the same step as he or she was in the old classification.

DECISION: 82-75

City of Halifax AND Halifax Civic Workers' Union, Local 108

D. Merlin Nunn, Q.C., Chairman; Eric Durnford, Joe Ross

Charles MacDougall, for the union
Gerald Goneau, for the employer
February 19, 1982

ISSUE: Insubordination 7:3600; Reasonableness of the Penalty 7:4300

CIRCUMSTANCES: The grievor and two others were found to have been away from their work area. They explained that they had gone for coffee, admitting that they had taken longer than their alotted break. They were directed to attend a meeting later that morning. A shop steward was present at the meeting. The grievor arrived at the place of the meeting but refused to attend, despite a direct order from a supervisor. The grievor maintained that he refused because he was afraid of what he would do at the meeting if unjustly accused. The grievor was given a one day suspension for being away from his work area and a one day suspension for refusing to attend the meeting. The grievance re discipline for being away from his work area was settled. The arbitration concerned only the grievance re the discipline for refusing to attend the meeting.

AWARD: The grievance is dismissed. Although there is considerable doubt that this meeting was necessary, the order to attend was one that had to be obeyed. A one day suspension is relatively mild discipline, and appropriate in the circumstances.

DECISION: 82-75 (CONT'D)

DISSENT: The union nominee, Joe Ross, dissented. He would have substituted a letter of reprimand.

DECISION: 82-76

Canadian Air Line Employees' Association AND Eastern Provincial Airways Limited

Innis Christie, Arbitrator

J. J. Nyman, for the union
Ralph Farley, for the employer
October 18, 1982

ISSUE: Applications of Seniority - Promotion, Demotion and Transfer 6:2100; Distribution of Work Within the Bargaining Unit - The Requirement of Bona Fides 5:2300; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100

CIRCUMSTANCES: The Union grieved when the Company amalgamated the Halifax City ticket office with the airport passenger check-in counter and offices. This affected the scheduling of employee hours and places of work. The Union alleged that according to the Collective Agreement, the Company could not make such a change without their consent and that in so doing, the Company undercut seniority rights.

Alternatively, the Union took the position that if the Company had the unilateral right to amalgamate the locations, it could do so only for bona fide business purposes whereas here the grounds had been disciplinary in nature.

AWARD: The grievances succeeds. Management's right to direct the work force was limited by the terms of the Collective Agreement. Interpreting the articles dealing with locations in the context on the Collective Agreement, the Arbitrator concluded that the locations could not be amalgamated without the Union's agreement. The Company was ordered to revert to operating the Halifax City ticket office as a separate locations.

Because of the success of the first submission, the second one was not dealt with.

AUTHORITIES: Re Arsenault and Lanteigne and the Queen in List of New Brunswick (1980), 27 L.A.C. (2d) 358; Algoma Steel Corporation (1968), 19 L.A.C. 236; Brown and Beatty: Canadian Labour Arbitration, para. 5:2300

DECISION: 82-77

Canadian Brotherhood of Railway, Transport and General Workers, Local 507 AND Nova Scotia Power Corporation

DECISION: 82-77 (CONT'D)

Frank Elman, Q.C., Arbitrator

Tom Barron, for the union
Gregory North, for the employer
August 27, 1982

ISSUE: Preliminary Objection 3:2100; Time Limits 2:3128

CIRCUMSTANCES: The employer raised a preliminary objection based on the union's failure to comply with time limits after stage 5 of the grievance procedure. Time limits had been waived earlier, but the employer served notice on the union that, hereafter, time limits would be strictly enforced. One union official was ill, another had an illness in his family, and a third took over responsibility for the grievance. The collective agreement contained the following provision.

> "Time limits in the grievance procedure may be mutually extended by the parties and will in any case be extended due to legitimate illness or absence from duty on the part of those concerned with the grievance."

AWARD: The preliminary objection succeeds. The time limits are mandatory. They were not extended by agreement. The third union official had become a party, and since he was available, the latter part of the provision did not operate to automatically extend time.

DECISION: 82-78

Energy and Chemical Workers Union, Local 44 AND Connors Brothers Limited

Innis Christie, Arbitrator

Ian Thorne, for the union
Gary Foster, for the employer
August 25, 1982

ISSUE: Insubordination 7:3600; Reasonableness of the Penalty 7:4300; Discrimination 7:4414

CIRCUMSTANCES: The arbitration concerned two separate grievances, one regarding a suspension, the other regarding a discharge. The grievor's prior disciplinary record consisted of a warning letter re overstaying of breaks.

The suspension incident arose out of the grievor's insistance on one particular occassion that she would perform only one of the assigned tasks. For the next few days the grievor was not called into work. The grievor claimed that this was an unjust suspension. The grievor produced a medical certificate to show that the problem was a medical one, but the company was not informed of the medical problem until several days after the refusal.

DECISION: 82-78 (CONT'D)

The discharge incident began when the chargehand admonished the grievor for using a telephone without permission. The grievor responded by swearing at and threatening the chargehand. The arbitrator concluded that the grievor had no intention of carrying out the threats, and that the employer had also assumed this.

The union alleged discrimination against the grievor.

AWARD: The first grievance fails. There was no disciplinary suspension or alternately, if there were, it was for cause because of the grievor's failure to explain her refusal.

The second grievance is allowed in part. Although the grievor was grossly insubordinate, discharge is too severe a penalty for a first infraction of this type. A one month suspension is substituted.

The evidence does not substantiate the allegation of discrimination.

DECISION: 82-79

NABET AND New Brunswick Broadcasting Company Limited

Innis Christie, Arbitrator

Barney Dobbin, for the union
Kenneth Clark, for the employer
July 30, 1982

ISSUE: Functus Officio 1:5600; Submission to Arbitration 2:1300; Remedial Authority of the Arbitrator 2:1400; Damages 2:1410; Missed Overtime Opportunities 2:1423; Remedial Authority of the Arbitrator - Promotions 6:4100

CIRCUMSTANCES: This was an arbitration under the Canada Labour Code. In an earlier award the arbitrator ruled that the grievor had been improperly denied a promotion. He had ordered that the grievor be given a three month trial period, as set out in the collective agreement. The arbitrator had retained jurisdiction to deal with the question of damages.

Damages had not been requested in the grievance form. The union first claimed them at the hearing. The company objected to the jurisdiction of the arbitrator to award damages, both because the arbitrator was functus officio and because the failure to claim damages in the grievance form was fatal.

As to quantum, the union claimed that difference between the salaries of the grievor's old job and new job, from the date the grievor was initially denied the promotion until the date of the earlier award. This was a period of almost six months. The company objected on the basis that the award only gave the grievor a three month trial. The union also claimed lost overtime, equal to the amount of overtime paid to the employee who had initially and improperly gotten the job.

DECISION: 82-79 (CONT'D)

AWARD: The union's claim for damages is allowed. Since the arbitrator had specifically retained jurisdiction to deal with damages, he cannot be functus officio. The failure to claim damages in the grievance form does not preclude an award of damages if claimed at the hearing. An adjournment is, however, appropriate where damages are claimed for the first time at the hearing.

As to quantum, although it is not certain that the grievor would have gotten the job on a permanent basis, there is no reason to assume against the grievor. The difference in salaries should accordingly be paid for the full period since the improper denial of the promotion. The union's measure of lost overtime is the only appropriate measure in the circumstances.

DECISION: 82-80

Halifax Industries Limited AND Industrial Union of Marine & Shipbuilding Workers of Canada on behalf of certain employees.

Judge J. A. MacLellan, Arbitrator

Gerald McConnell, for the union
Deborah Carver, for the employer
September 10, 1982

ISSUE: Scheduling Work - Proprietary Rights to Overtime Assignments: Persons Normally Performing the Work 5:3222; Scheduling Work - Remedies 5:3240

CIRCUMSTANCES: The grievors alleged that they were improperly denied overtime work. They had been called in to work overtime, expecting to work to the finish. After sixteen hours, they were told to go home, the "new policy" being that no one should work more than sixteen hours at a stretch. The men were told that they would be called back if the job was not finished by the next shift. They were subsequently told not to return to work. Later they discovered that their reliefs had finished the work, although this required some workers to work longer than sixteen hours.

Evidence was given that employees in the past had often worked in excess of sixteen hours when working overtime. The Collective Agreement stated that the employee working on the job would have preference on the overtime job.

AWARD: The grievance succeeds. The Company was ordered to pay the amount of overtime that the Grievors would have earned on the day in question.

DECISION: 82-81

The International Association of Firefighters, Local Union No. 268 AND The City of Halifax

DECISION: 82-81 (CONT'D)

Judge Nathan Green, Arbitrator

Brian T. Johnston, for the union
Barry S. Allen and Gerald J. S. Goneau, for the employer
September 10, 1982

ISSUE: Distribution of Work Within the Bargaining Unit - Vacancies 5:2510; Distribution of Work Within the Bargaining Unit - Procedural Requirements 5:2500

CIRCUMSTANCES: The Union grieved that a permanent vacancy had not been filled within a period of three months as agreed in the Collective Agreement.

The position had been filled with a temporary appointment. Later a notice of competition was posted in accordance with policy. This was followed by a notice of postponement of the routine. When the department was subsequently reorganized, the duties of that position were reduced because of the transfer of duties to other positions.

The City took the view that the job really did not exist and that one of the Articles under contention covered the temporary substitution. The result of the restructuring was that there was no vacancy at all.

AWARD: The grievance succeeds. The Collective Agreement was clear and unambiguous. It was recognized that the person placed in the position was there temporarily as shown by the agreement of the City to pay him the wage rate for which the job called. The job in question was in existence for several months after the deadline by which it should have been filled. During that time there was ample work to fill the position - no emptiness existed. Therefore the City was required to fill the vacancy in accordance with its practice.

AUTHORITIES: Re Oil, Chemical and Atomic Workers, Local 9-599 and Tidewater Oil Co. (Canada) 1963, 14 L.A.C. 233; Toronto Star Ltd. and Communications Union, 12 L.A.C. (2d) 397.

DECISION: 82-82

Nova Scotia Teachers Union AND Halifax County - Bedford District School Board, successor to the Municipal School Board of the County of Halifax

Judge Nathan Green, Arbitrator

George M. Mitchell, for the union
Eric Durnford, for the employer
September 10, 1982

ISSUE: Interpretation of Collective Agreement - The Collective Bargaining Context 4:2300; Distribution of Work Within the Bargaining Unit - The Requirement of Bona Fides 5:2300

DECISION: 82-82 (CONT'D)

CIRCUMSTANCES: The terms of the Collective Agreement provided for every teacher to have a total of 240 minutes for each six-day cycle (or time equivalent) free from teaching for the purpose of marking and preparation. Because of cut-backs in the proposed budget, the Board circulated a notice that it would be necessary to reduce the number of teaching positions and therefore it would be impossible to provide all teachers with the benefits described.

The Union grieved that the Board had unilaterally taken steps to put into effect a program which constituted a breach of the Section, thereby changing the Collective Agreement which could not be done unilaterally. Therefore they requested a restraining order.

The Board contended that there was no need to have a system in place to respond to a request for this marking and preparation time since it is an individual matter of entitlement for each teacher, who may or may not request the entitlement, just as in the comparable matter of sick leave. The Board maintained that, being professionals, the teachers would recognize the economic problem and not request the entitlement. The Board argued that until a specific individual considering himself/herself aggrieved, no remedy effecting any particular individual should be provided, i.e. nothing more than a declaration should be granted.

AWARD: The grievance succeeds. The Arbitrator found that the clear and unambiguous wording of the Article that the Board have in place a mechanism to meet the entitlement. Failure to do so constituted a breach. The circulated notice made clear the Board's intention and the proposed changes were tantamount to a unilateral change of the agreement which it could not do. Therefore, the Board was ordered to put the necessary mechanism into effect, providing the 240 minutes per 6-day cycle.

AUTHORITIES: Re Retail Workers, Local 461 & Weston Bakeries Ltd, 6 L.A.C. 213; Re Amalgamated Clothing Workers of America and Polax Tailoring Ltd., 24 L.A.C. 201; Re Regent Refining and Oil, Chemical and Atomic Workers, 5 L.A.C. (2d) 199; Re Samuel Cooper & Co. Ltd. and Int'l Ladies Garment Workers Union, 35 D.L.R. (3d) 501; Nova Scotia Civil Service Commission v. Nova Scotia Government Employees Union, SH 36565 S153/10; Re Niagara South Board of Education and Teachers Federation, 26 L.A.C. (2d) 332.

DECISION: 82-83

Atomic Energy of Canada Limited, Port Hawkesbury Heavy Water Plant AND Energy and Chemical Workers' Union, Port Hawkesbury, Local 832

D. Merlin Nunn, Chairman; Donald H. McDougall and Dennis Grant

Ian Thorn, for the union
Eric Durnford, for the employer
August 2, 1982

DECISION: 82-83 (CONT'D)

ISSUE: Assignment of Bargaining Unit Work to Non-employees: Contracting Out 5:1300; Admissibility of Evidence - Past Practice 3:4430; Scheduling Work - Proprietary Rights to Overtime Assignments 5:3220

CIRCUMSTANCES: The Employer had hired a sub-contractor to install a new system in the plant during the bi-annual Maintenance Turnaround Shutdown. The sub-contract was a fixed price contract which was to be completed by a specified date. Because the subcontractor fell behind in the schedule and because it was important that the deadline be met, the employees of the sub-contractor were asked to work on a Saturday with A.E.C.L. paying the differential premiums in overtime pay.

The Union grieved that the employees of the sub-contractor became employees of the Employer when the Employer paid the overtime differential. Therefore, based on past practice and on interpretation of a Letter of Agreement appended to the Collective Agreement, it was necessary to employ the "matching system" for Union members. The "matching system" meant that whenever employees of other contractors worked overtime then an equal number of A.E.C.L. employees were given overtime work to do. The work given was not necessarily the same as required of the overtime workers.

AWARD: The grievance fails. The Board stated that past practice was to be employed in interpreting a collective agreement only where ambiguity exists. The clauses in question referred specifically to the contracting out of maintenance work. The situation being grieved involved new construction which only coincidentally was done during a maintenance shut-down. The argument that the employees became employees of the Employer because A.E.C.L. paid the overtime premiums was not accepted.

AUTHORITIES: John Behtram & Sons Co. Ltd. (1967), 18 L.A.C. 362; Brown and Beatty: Canadian Labour Arbitration, p. 131.

DECISION: 82-84

Allwood Products Limited AND Carpenters Union, Local 2325

R. Lorne MacDougall, Q.C., Arbitrator

Ronald Pink, for the union
Eric Durnford, for the employer
September 22, 1982

ISSUE: Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400, 6:2354

CIRCUMSTANCES: The union grieved a violation of an article which reads, in part 'no employee ... will be laid off as a direct result of the performance of work which is normally performed by employees within the bargaining unit by supervisory personnel who normally do not perform any such work'.

DECISION: 82-84 (CONT'D)

Because of an economic downturn, there had been a layoff at the plant. During the layoff it is indisputed that three supervisors did some bargaining unit work. The employer explained that these foremen could not be laid off because they would be needed when there was a general recall, and the employer did not want to risk losing them. The employer's evidence was that if the supervisors had not done the bargaining unit work, no bargaining unit employees would have been recalled. The union argued otherwise.

The employer argued that the only relevant time was when the layoff occurred, which was before the supervisors began doing bargaining unit work. Hence the supervisors doing bargaining unit work did not cause the layoff. The union argued that the article applied if supervisors doing bargaining unit work caused employees to remain on layoff who would otherwise have been recalled.

AWARD: The grievance fails. The relevant time is the date of the layoff, or the date of any extension beyond the original scheduled end of the layoff. The supervisors doing bargaining unit work had not caused the layoff.

DECISION: 82-85

United Steelworkers of America, Local 1231 AND Hawker Siddeley Canada Inc. (Trenton Works Division).

Milton Veniot, Arbitrator

Robert Young, for the union
John Howatson, for the employer
September 24, 1982

ISSUE: Missed Overtime Opportunities 2:1423; Compliance with the grievance procedure 2:3120; Prior Award 2:3220; Preliminary Objections 3:2100; Past Practice 3:4430

CIRCUMSTANCES: The grievor, O, complained of a lost overtime opportunity, in Halifax, over the Easter weekend. The collective agreement stipulated that overtime was to be offered to qualified employees by seniority. It was undisputed that the grievor was qualified, and more senior than E, who performed the work.

P, who was qualified and senior to both E and O, also had grieved. His grievance was denied for unspecified reasons, and he did not proceed to the next step.

The employer raised two preliminary objections.

The employer claimed there was a past practice that where two persons grieved a missed overtime opportunity, only the grievance of the most senior could be processed. It also raised an argument of res judicata in relation to P's grievance.

The employer claimed that there had been no employer decision at step 3 which allowed the union to proceed to step 4 - arbitration. The employer position at step 3 had been that the grievance was not grievable.

DECISION: 82-85 (CONT'D)

On the merits, the employer claimed that capability was the only consideration and that the collective agreement did not apply to work not on the employer's property.

AWARD: The grievance succeeds. The grievor is to be compensated for lost overtime.

The evidence does not disclose a past practice which could deny the grievor's right to grieve. The right to grieve must be distinguished from any rights on the merits. Res judicata does not apply. The decision in P's case was not a quasi-judicral decision. Furthermore, it cannot be said that the same issue arose in P's case since it is not known on what basis P's case was decided.

The employer's position at step 3 was a decision which enabled the union to proceed to arbitration.

On the merits, there is nothing to support the arguments that capability is the only consideration or that the collective agreement does not apply off the employer's property.

DECISION: 82-86

Canadian Union of Postal Workers AND Canada Post Corporation

Innis Christie, Arbitrator

Wayne Mundell, for the union
Ross Dumoulin, for the employer
September 23, 1982

ISSUE: Onus 3:2400; Duration and Loss of Seniority 6:1200; Prior Arbitration Awards and Judicial Decisions 4:2220

CIRCUMSTANCES: This was an arbitration under the Canada Labour Code.

The union alleged that three persons should have lost their seniority by virtue of a provision in the collective agreement which says that persons lost seniority when transferred out of the bargaining unit. There are exceptions to the provision. If the transfer is to a 'managerial position', past seniority is not lost if the position is in a small post office (less than 15 bargaining unit employees or less than ten supervisors) and the employee returns to the unit within six months. If the transfer is to a 'non-managerial position', seniority continues to accumulate if the employee returns to the unit within six months.

Questions of onus, and of the meaning of 'managerial' position, return to the bargaining unit, and small post office were at issue.

AWARD: The grievance succeeded in respect of one person but failed in respect of the other two.

DECISION: 82-86 (CONT'D)

The union bears the initial onus, but the burden to prove the exceptions falls upon the employer.

'Managerial' in this context means supervisory only, and not the restricted meaning applied in other contexts.

If a person goes on vacation within six months of the transfer, and is paid during the vacation at the bargaining unit rate, this is a return to the bargaining unit even if the only reason for the vacation is to prevent loss of seniority. If the arbitrator were deciding this issue afresh, he probably would have decided otherwise, but for the sake of stability, followed prior decisions on this article.

The size of the post office is to be determined just prior to the transfer.

DECISION: 82-87

Canadian Union of Postal Workers AND Canada Post Corporation

Innis Christie, Arbitrator

Ted Penny, for the union
Ross Dumoulin, for the employer
September 8, 1982

ISSUE: Insubordination 7:3600; Admissability of Evidence 3:4000; Work Performance 7:3500

CIRCUMSTANCES: This was an arbitration under the Canada Labour Code.

The grievor was given a two day suspension for poor work performance. The employer claimed that the grievor was away from his work station for considerable periods, returning only when his supervisor approached. The grievor said he was only away once. The supervisor also noted the grievor had very low productivity. The union challenged the reliance on this factor as a violation of the collective agreement prohibition against individual measurement.

The grievor's prior disciplinary record was a warning letter re punctuality and a suspension for insubordination - refusal to return to work station. The employer sought to introduce evidence of a verbal warning. The union objected on the basis that, according to the collective agreement, verbal wanings were not part of the employee's file, and only his file could be used against him. It was somewhat unclear whether the prior verbal warning had been taken into account by the employer in assessing the penalty in the instant case.

AWARD: The grievance fails. The grievor's testimony is not credible. The arbitrator found that the grievor had been away from his work place for considerable periods. The reference to low productivity was ancillory, and not an improper individual measurement.

The evidence of the verbal warning was not admissable, and not properly taken into account in assessing the penalty. It does not appear that this was done. The two day suspension is appropriate.

DECISION: 82-88

Twin Oaks Memorial Hospital Local of the Nova Scotia Nurses Union AND Twin Oaks Memorial Hospital

Innis Christie, Chairman; Donald McDougall; Raymond Larkin

David Reynolds, for the union
Eric Durnford, for the employer
August 30, 1982 (majority); September 20, 1982 (dissent)

ISSUE: Policy grievances 2:3124; Time Limits 2:3128; Retroactivity 4:1610; Wages - Retroactivity 8:1300; Educational or Experiential Increments 8:2330

CIRCUMSTANCES: The union processed a policy grievance concerning the failure of the employer to properly assign nurses to the appropriate levels on the salary scale, and the failure to make such assignments retroactive. The first collective agreement between the parties was ratified in November, 1981, but wages were made retroactive to April 1, 1981. Placement on the salary scale depended on proof of satisfactory previous nursing experience.

The question of the proper placement on the salary scale was not raised until March, 1982. The employer claimed that any remedy could only cover the 10 days previous, because of the provision that an individual grievance be launched within 10 days.

On the merits, the union claimed that the retroactivity of wages included placement on the salary scale. The employer disagreed.

There was also a dispute as to when a nurse had to produce the evidence of previous nursing experience. The employer claimed that such proof had to be offered after the signing of the collective agreement to affect placement on the salary scale. The union disagreed.

Another issue of contention was the matter of what constituted 'satisfactory' previous nursing experience.

AWARD: The grievance succeeds except for the determination of 'satisfactory' previous experience.

The employer's contention concerning the time restriction on the remedy is not accepted. This is a union grievance for which there are no time limits. Since it could be expected that the salary scale would take some time, the union's grievance was not out of time even assuming a 10 day time limit. Also, the time limits are directory, and it is doubtful that directory time limits could restrict the remedy under a continuing grievance.

Placement on the salary scale is part of wages, and hence to April 1, 1981.

Proof of previous nursing experience could be made at any time. Information provided at the time of hiring was sufficient.

The qualification of 'satisfactory' gives discretion to the employer to assess previous nursing experience.

DECISION: 82-88 (CONT'D)

The employer is directed to assess each grievor's previous nursing experience, and place her on the salary scale retroactive to April 1, 1981.

DISSENT: (McDougall) Placement on the salary scale is not wages, and hence not retroactive. Also, several of the grievors had not produced evidence of previous nursing experience.

DECISION: 82-89

Bakery, Confectionary and Tobacco Workers' International Union, Local 446 AND Kenvic Transport Limited

N. M. Scaravelli, Arbitrator

Rene Quigley, for the union
No one appearing for the employer
September 29, 1982

ISSUE: Notice to Parties Affected 3:1210; Union Security 9:1200

CIRCUMSTANCES: The union grieved the failure of the employer to remit union dues to the union. The deductions had been made from the employees' pay. No one from the employer appeared although he had been advised by mail and efforts had been made to contact him personally.

AWARD: The grievance succeeds. The employer is ordered to pay the union dues deducted to the union. The arbitrator was satisfied that reasonable notice of the hearing had been given to the employer.

DECISION: 82-90

Canadian Union of Public Employees (Police Unit), Local 232 AND Board of Police Commissioners of the Town of New Waterford

T. J. K. Gillis, Q.C., Arbitrator

James Crosby, for the union
John Gillis, for the employer
September 23, 1982 (hearing date)

ISSUE: Skill and Ability - Senior Employee with Required Ability 6:3210; Application of Seniority 6:2000

CIRCUMSTANCES: This is a seniority grievance. The collective agreement provided that where persons were qualified, seniority governed re promotions. The grievance concerned a temporary transfer to the position of Seargeant Investigator. The

DECISION: 82-90 (CONT'D)

person given the appointment was less senior than the grievor. The employer's evidence was that the grievor needed supervision to carry out this task whereas the person appointed did not.

AWARD: The grievance fails. The grievor, since he needed supervision, was not qualified. In any event, the seniority provision probably did not apply to temporary transfer, although it is not necessary to decide this point.

DECISION: 82-91

Retail, Wholesale and Department Store Union, Local 596 AND Metropolitan Stores (Glace Bay).

Frank Elman, Q.C., Arbitrator
October 8, 1982

ISSUE: Insolent, Unco-operative Behavior, Obscene Language 7:3660; The Doctrine of the Culminating Incident 7:4310; Mitigating Factors 7:4400

CIRCUMSTANCES: The two grievors were discharged for directing abusive language toward the manager. One of the grievors was a shop steward, the other a member of the union. The incident took place in the manager's office during a discussion of whether the collective agreement had been followed in assigning vacations. The employer suggested at the hearing that there had been previous similar problems with both employees, but only one had been previously disciplined. She had been given a three day suspension.

AWARD: The grievance succeeds in part. The grievors are reinstated without loss of seniority, but without compensation for lost wages. The doctrine of the culminating incident cannot be relied upon unless there was previous discipline. In the present circumstances, the penalty is mitigated because the incident arose not in the course of the grievors' employment but during the conduct of union business, and in the manager's office (as opposed to on the floor of the store), and because of the grievors' seniority.

DECISION: 82-92

The Construction Management Labour Bureau Limited, on behalf of its member O'Malley Electric Limited AND International Brotherhood of Electrical Workers, Local 625

Milton J. Veinot, Arbitrator

G. J. McConnell, for the union
Eric B. Durnford, for the employer
October 22, 1982

DECISION: 82-92 (CONT'D)

ISSUE: Union Rights - Union Security 9:1200; Limitations apart from the Collective Agreement 2:3220; Primary Sources of Jurisdiction - The Collective Agreement 2:1200; Secondary Sources of Jurisdiction - Promissory Estoppel 2:2200

CIRCUMSTANCES: The Collective Agreement binding the Union and the Board provided for the deduction of Union dues by the Employer from all employees who gave written authorization. It also stated that the Employer should deduct a specified amount for each hour worked to forward to the Union Recreation Fund.

The Bureau maintained that it could not deduct the amounts for the Recreation Fund because it did not have written authorization from the Employee to so interfere with his pay. Counsel for the Board also argued the doctrine of res judicata in relation to the decision of Arbitrator Outhouse between the Union and George H. Mitchell Contractors Ltd. (January 12, 1982; 82-02). The arbitrator Outhouse determined that the Employer could not deduct monies in the absence of written authorization.

The Union maintained the Collective Agreement gave sufficient authorization to the Employer to deduct for the recreation fund; therefore, no other written authorization was required. Promissory estoppel was also argued by the Union, who stated that the negotiating history compelled the Bureau to live with its representations until the end of the present agreement.

AWARD: The grievance succeeds. The Arbitrator found that the Collective Agreement was authorization enough to allow the Employer to deduct for the Recreation Fund. This was based on interpretation of the relevant section of the Agreement and on s.39 of the Trade Union Act which states that the Collective Agreement binds every employee within its scope.

He did not feel that a case was made for promissory estoppel since the doctrine cannot be used to found a claim. It can be used only to prevent the enforcement of a claim upon which the enforcer might at law be entitled to insist, but which equity prevents him from asserting in the interests of fairness.

He also found that he was not bound to follow the Mitchell decision.

AUTHORITIES: International Brotherhood of Electrical Workers, Local 625 and George H. Mitchell Contractors Ltd. (Outhouse), January 12, 1982; 82-02; Bentley v. Rotherham and Kemberworth Local Board of Health (1876), 4 Ch. D. 588; Re Canadian Union of Public Employees, Local 1392 and Governors of Dalhousie University (1980), 39 N.S.R. (2d) 653; Canadian Industries Ltd. and United Steelworkers Local 6350 (1974), 7 L.A.C. (2d) 110; Re International Brotherhood of Electrical Workers, Local 625 and Easco Electric Limited (Langille), February 9, 1981; 81-38; Brown and Beatty: Canadian Labour Arbitration (1977) para. 2-3220, pp. 86-87; Re Phillips Cables Limited and United Electrical, Radio and Machine Workers, Local 510 (1977), 16 L.A.C. (2d) 225; Re Brewers Warehousing Co. Ltd. and International Union of Brewery, Flour, Cereal, Yeast, Soft Drink and Distillery Workers, Local 278C (1954), 5 L.A.C. 1797; Re Hoogendorn and Greening Metal Products and Screening Equipment Co. et al (1967), 62 D.L.R. (2d) 167.

DECISION: 82-93

United Textile Workers of America, Local 486 AND Huyck Canada Limited

Judge Nathan Green, Chairman; Mr. Boyd MacGillivray, Q.C., Union nominee, Mr. Eric Durnford, Company nominee

Mr. Ron Myslowka, for the union
Mr. A. P. Tarasuk, for the employer
October 1, 1982

ISSUE: Applications of Seniority - Promotion, Demotion and Transfer 6:2100; Distribution of Work within the Bargaining Unit - Procedural Requirements 5:2500; Interpretation of Collective Agreements: The Collective Bargaining Context 4:2300

CIRCUMSTANCES: The grievance was that of an employee who had been with the Company ten years and did not get the job within the Company for which he had applied. His grievance was based on the sections of the Collective Agreement which provided for promotion on the basis of seniority by job, department and the plant.

The Company maintained that it had complied with the relevant articles, having gone through the seniority lists and where there were no further directions in the Collective Agreement, it decided under the management rights clause, to select a person with some relevant experience, although less senior.

The Union contended that the job was basically an orientation situation and that the successful applicant would require as much training as would the grievor.

AWARD: The grievance fails. Where there is no provision as to what the parties can do once they have exhausted the directives in the Agreement, the conduct of the company must be judged against the reasonableness of its actions in the circumstances. The Company behaved reasonably in deciding on someone who had some exposure to the work and no evidence indicated that it was done in bad faith or was arbitrary or discriminatory.

The Union nominee dissented although no written reasons were given.

AUTHORITIES: Re: Lake Ontario Steel and United Steelworkers, 10 L.A.C. (2d) 16; Re: Liquid Carbonic Canada Ltd. and United Steelworkers of America, 53 D.L.R. (3d) 659

DECISION: 82-94

Canadian Union of Public Employees, Local 3010 AND Children's Aid Society of Cape Breton

Frank L. Elman, Q.C., Chairman; Robin Campbell and Linda Gallant

Elizabeth Walsh, LL.B., for the union
Bernard Boudreau, LL.B., for the employer
September 17, 1982

DECISION: 82-94 (CONT'D)

ISSUE: Distribution of Work within the Bargaining Unit - The Requirement of Bona Fides 5:2300; Applications of Seniority - Promotion, Demotion and Transfer 6:2100; Interpretation of Collective Agreement - The Object of Construction: Intention of the Parties 4:2100

CIRCUMSTANCES: The grievor, a social worker, had applied for a lateral "transfer" to a job with similar responsibilities but with different geographic boundaries. This was requested because it would mean a change in her case load and working with an experienced worker, which to her would be a better job. She was informed that her request was invalid and could not be implemented . The Society indicated that in filling the position they were considering the effectiveness of the units. To have permitted the transfer would have meant a disruption in the client relationship of the grievor as well as in the position being filled. The position was given to a more senior applicant from another Division.

At issue was whether there could be a transfer within the Division, without regard for seniority, ability, or any other consideration contemplated by the Collective Agreement.

AWARD: The grievance fails. It was not felt that the grievor discharged the onus of proof required. In the absence of explicit language in the Collective Agreement, the conclusion was drawn that the employee had no right to obtain another job in the same classification.

DISSENT: (Gallant) In her opinion the Collective Agreement provided explicit language permitting employees to apply and be considered for transfers.

DECISION: 82-95

The Nova Scotia Nurses Union of the Glace Bay Community Hospital AND The Board of Management of the Glace Bay Community Hospital

Judge J. A. MacLellan, Donald H. McDougall and Raymond Larkin

David Reynolds, for the union
Eric Durnford, for the employer
October 25, 1982

ISSUE: Primary Sources of Jurisdiction: The Statutory Requirement 2:1100; Secondary Sources of Jurisdiction: Promissory Estoppel - The Doctrine 2:2210; Discipline and Discharge Procedures: Proceedings Prior to Arbitration 7:2100.

CIRCUMSTANCES: The grievor, a nurse, filed a grievance alleging unjust dismissal fifteen days after the Director of Nursing informed her that she was dismissed from her employment. At this interview the grievor received the impression that she would be given the option of resigning. Six days after this interview the grievor received a letter of dismissal confirming the results of the interview but making no mention of resignation.

DECISION: 82-95 (CONT'D)

According to the Collective Agreement, any grievance had to be filed within ten days of dismissal. The Hospital raised a preliminary objection that the grievance was not initiated within the required time period, using the date of the interview as the date of dismissal. Counsel for the Grievor argued that the Hospital was estopped from arguing the mandatory time limits because of the subsequent letter.

AWARD: The grievance fails because the preliminary objection of the Hospital was allowed. The consensus of the Board was that the dismissal was given, accepted by the Grievor and became effective the date of the interview.

Raymond Larkin dissented. He felt that the grievor was not effectively terminated until the date of the letter. He interpreted the Collective Agreement to require written dismissal before effective termination. He also relied on a general labour relation practice that timeliness should run from the date of the formal written step rather than a verbal run, where the parties contemplate such a written step. It was also his opinion that the Hospital was estopped from relying on the untimeliness of this grievance, because of its conduct in offering the option of resignation to the grievor until the date of the letter. The time limit should have commenced running when the notice of termination was actually communicated and understood. Mr. Larkin also felt that the grievance of an employee with long years of excellent service should not be dismissed on technical grounds alone without the clearest and most compelling of contract language. He pointed to the Trade Union Act which allows for settlement of differences as his rationale for this.

AUTHORITIES: Brown & Beatty: Labour Arbitration in Canada, p. 67; Re CIP Containers Ltd. and International Chemical Workers (Local 229), (1973) 2 L.A.C. (2d) 308; Re: Wilnes Fuel Oil Ltd. and Teamsters' Union, Local 352, (1981) 29 L.A.C. (2d) 427; Re: Budd Automotive Canada Co. Ltd., and U.A.W. (unreported, February 1972 (Brown)); Re: Calgary Public Library and C.U.P.E. Local 1169 (1978), 19 L.A.C. (2d) 230; Re: Mirador Motor Inn and Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (1973), 2 L.A.C. (2d) 339; Re: Atlas Steels Ltd. and U.S.W. Local 7777 (1974) 7 L.A.C. (2d) 24; Re: Valade and Eberlee, (1972) 1 O.R. 682, 24 D.L.R. (3d) 38; RE: Air Canada and Canadian Airplane Flight Attendants Association (1979), 21 L.A.C. (2d) 1; Civic Employees Number 43 and City of Toronto (1968), 19 L.A.C. 363; Re: United Glass and Ceramic Workers and Bestpipe Limited (1967) 18 L.A.C. 94; Palmer: Canadian Labour Arbitration, p. 149; Re: Cooper Tool Group Limited and United Steelworkers Local 6497 (1967), 13 L.A.C. (2d) 367; International Association of Firefighters (Local 268) v. City of Halifax, (1982) 50 N.S.R. (2d) 229; Canadian Airline Employees Association and Haley v. Eastern Provincial Airways (1963) Limited (1981), 49 N.S.R. (2d) 28

DECISION: 82-96

Nova Scotia Government Employees Union AND Civil Service Commission

S. Bruce Outhouse, Chairman; Wayne Rogers and Eric B. Durnford

DECISION: 82-96 (CONT'D)

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
October 22, 1982

ISSUE: Grounds for Discipline - Attendance at Work 7:3100; Illness: Benefits and Other Rights - Entitlement to a Job - Proof of Recovery 8:3342; Remedial Authority of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470

CIRCUMSTANCES: The grievor grieved his dismissal claiming reinstatement without loss of pay or benefits. After almost six years of employment, the grievor was dismissed because of his high rate or absenteeism after numerous warnings.

During the proceedings, evidence was given that the grievor had had an alcohol and drug addiction problem which he had concealed from his employer despite being questioned about his absences. Following his dismissal, he received treatment, which according to counsellors was successful.

At issues was whether the Employer violated the Collective Agreement in discharging the grievor. The Agreement stated that no employee could be discharged except for just cause. The Employer took the position that the relevant article did not apply to non-disciplinary discharges such as this case of innocent absenteeism.

AWARD: The grievance succeeds in part. The Board found that the article of the Agreement was applicable to non-disciplinary discharges, based on interpretation and confirmed by the wording of the predecessor article. The Employer had just and sufficient cause for dismissal if it was established that there was undue absenteeism in the Grievor's past record and that the Grievor was incapable of regular attendance in future. Although the former condition was satisfactorily proven, evidence indicated that the grievor's attendance was likely to be regular in future.

Because the Employer gave generous notice of dismissal, although the Grievor did not immediately seek help and continued to hide his addiction problem, the Grievor was ordered to be reinstated without compensation. The reinstatement was subject to several conditions.

AUTHORITIES: Amalgamated Transit Union, Local 408 and Metropolitan Transit Commission (unreported, July 22, 1982, Outhouse); Re: U.A.W., Local 458, and Massey-Ferguson Industries Ltd. (1972), 24 L.A.C. 344; Re: Niagara Structural Steel (St. Catharines) Ltd. and United Steelworkers, Local 7012 (1973), 18 L.A.C. (2d) 385; Tatlock case (unreported, February 15, 1982, Clarke); Re Crouse - Hinds Canada Ltd. and United Automobile Workers (1981), 3 L.A.C. (3d) 230

DECISION: 82-97

International Brotherhood of Electrical Workers, Local 1030 AND Maritime Telegraph & Telephone Company, Limited.

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Gregory I. North and Terry L. Roane, for the employer
October 29, 1982

ISSUE: Discipline - Discharge distinquished - Resignation 7:7100; Jurisdiction of the arbitrator - Reinstatement and substitution of penalty 2:1470

CIRCUMSTANCES: The grievor wished her job reinstated after she had submitted her resignation. She had resigned after an argument with her husband, having threatened to do so six weeks earlier. She had cleaned out her locker, handed in her key, signed her resignation paper, informed several people she was quitting and announced her resignation from the union. A day later, she indicated to her employer that she had changed her mind and wished her job back. The employer decided not to reinstate her because of her absentee record and because she had resigned without proper notice. At issue was whether the grievor truly intended to resign and was given sufficient consideration by the employer.

AWARD: The grievance fails. The Arbitrator found that the grievor expressed an unequivocal intention to resign which was reinforced by her subsequent conduct. The previously attempted resignation indicated premeditation. At the time of the resignation, the grievor was emotionally in control and not irrational. The grievor's reasons for resigning were not work-related so the employer could not be accused of seizing on the resignation as an excuse to get rid of an undersirable employee. Finally, as a union official, the grievor was fully aware of the implications of her resignation.

AUTHORITIES: Nova Scotia Government Employees Union and Civil Service Commission (unreported, January 18, 1982, Outhouse; 82-53); Re University of Guelph and Canadian Union of Public Employees, Local 1334 (1973), 2 L.A.C. (2d) 359 (Shime); Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1978), 18 L.A.C. (2d) 7 (Adams); Re Sun Oil Company Limited and Sun Oil Employees Association (1968), 19 L.A.C. 365 (Weiler); Re Coca-Cola Limited and United Brewery Workers (1980), 26 L.A.C. (2d) 354 (Beck); Re Charles Wilson Limited and United Brewery Workers (1981), 29 L.A.C. (2d) 233 (Betcherman); Highways of Nova Scotia and the Canadian Union of Public Employees, Local 1867 (unreported, 1980).

DECISION: 82-98

United Steelworkers of America, Local 1231 AND Hawker Siddeley Canada Inc. - Trenton Works Division

Judge J. A. MacLellan, Arbitrator

DECISION: 82-98 (CONT'D)

Robert Young, for the union
J. M. Hawatson, for the employer
November 5, 1982

ISSUE: Compensation - Fringe Benefits - Computation of Vacation and Vacation Pay 8:3230; Jurisdiction of the Arbitrator - Secondary Sources of Jurisdiction - Applications of Promissory Estoppel 2:2220

CIRCUMSTANCES: A preliminary objection was raised stating that according to the Collective Agreement proper procedures were not followed in filing the grievance. The Arbitrator gave the clause wide interpretation and heard the case on its merits.

At issue was the question of vacation pay. The Company had issued a new policy indacating that an employee could obtain half his vacation pay if he took a week of vacation prior to the plant shutdown and all of his vacation pay if he took two or more weeks. The union claimed estoppel, stating that it had been for many years company policy to give the employee his entire vacation pay whenever he took his vacation, no matter the length of the vacation leave.

AWARD: Because of the extended period of time during which the practice had been carried on, the argument of estoppel was accepted and the grievance succeeds.

DECISION: 82-99

Canadian Union of Public Employees Local 1392 AND Dalhousie University

Milton J. Veniot, Chairman; William Marsh and Donald MacDougall

October 27, 1982

ISSUE: Jurisdiction of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470; Discipline - Dishonesty - Theft 7:3310

CIRCUMSTANCES: The grievor was dismissed from his job as a cleaner at the University, after being implicated in the theft of a key which gained access to an unauthorized area. In criminal proceedings, he was found innocent.

AWARD: The grievance succeeds. Although the grievor's testimony differed from that of the security guard, there was nothing to indicate that he was guilty of offenses, which would necessitate disciplinary action. The Board ordered him reinstated. The Board ruled, however, that the greivor's subsequent lack of frankness with his employer and indeed even at the arbitration hearing, was such that it offended his duty as an employee and as a citizen and indeed iniated a chain of events which led to his dismissal. Accordingly the reinstatement was ordered to be without pay.

DISSENT: (Marsh) Although Mr. Marsh agreed that the grievor should be reinstated,

DECISION: 82-99 (CONT'D)

he felt that imposing the penalty of no back pay because the grievor had dissembled in his evidence, thereby leading to the confusion, implied a verdict of "guilty". It was his opinion that the grievor be reinstated with pay.

DECISION: 82-100

Public Service Alliance of Canada AND Camp Hill Hospital

S. Bruce Outhouse, Chairman; Donald H. McDougall and Tom Patterson

Derek Dagger, for the union
Eric B. Durnford, for the employer
November 4, 1982

ISSUE: Insubordination - Refusal to Follow Instructions - Exceptions - Union Officials 7:3623; Disciplinary Penalties - Employer Conduct - Discrimination 7:4414; Union Liability - Liability for an Unlawful Strike - Employees 9:2410

CIRCUMSTANCES: The Employer cancelled all vacation leaves upon learning of an impending strike. This meant that two union officials could not attend a union conference in Vancouver. After the Employer would not reinstate the leaves, the Union advanced the strike date so that the officials would be considered on rotating strike while at the conference. The strike was subsequently declared illegal and the officials were disciplined for insubordination upon their return from the conference.

The Union argued that the Employer discriminated in cancelling the officials' vacation leave since two other employees were allowed to take theirs. Secondly, it alleged that the officials were on rotating strike and therefore should not be treated any differently than the others who were on illegal strike and were not disciplined. Thirdly, the Employers refusal to grant leave without pay under the terms of the Collectie Agreement violated the agreement and that the grievors in their capacity as Union officials were entitled to disobey the Employer's instructions in pursuit of important Union business. Forthly, the Union contended that if the grievors were guilty, the penalty was too severe.

AWARD: The Board found no evidence of discrimination in cancelling the grievors' vacation leaves. On the basis of the evidence, it was impossible to compare the similarity of the circumstances of the two employees for whom an exception was made and those of the grievors.

According to the evidence, the grievors were not on a bona fide rotating strike, since that was meerely a device or strategem to enable them to attend the conference. Therefore, they were distinguished from the other employees, who believed they were on legal strike until the ruling otherwise. Consideration was given to the meaning of "strike".

The Board did not find violation of the Collective Agreement by the Employer since the Agreement gave the Employer broad discretion in scheduling vacation leaves.

DECISION: 82-100 (CONT'D)

The grievors were given as much notice of the cancellation of the leaves as was practical and reasonable. The Board could not find any urgency or necessity for the grievors' attendance at the conference to justify disobedience of the Employer's instructions.

For these reasons, the grievance fails. The origianl penalty was found to be reasonable regarding the nature of the offence.

AUTHORITIES: Bowater Mersey Paper Co. Ltd. v. The Canadian Paperworkers Union, Local 141, et al (1976) 22 N.S.R. (2d) 198 (Hart, J.); Brown and Beatty Canadian Labour Arbitration, pp. 350-351; Re Douglas Aircraft Co of Canada Ltd. and United Automobile Workers (1972), 2 L.A.C. (2d) 56

DISSENT: (Patterson) In dissenting with the majority, Mr. Patterson found that the grievors were on strike as validly as the others. Although the attendance at the conference affected the timing and method, it did not invalidate the strike on which the membership had voted. If the strike had not been declared illegal, they would not have been disciplined and the grievors reasonably believed their status to be that of a legal strike.

He found the Employer violated the Collective Agreement by making no effort to grant the vacations and by not supplying any valid reasons. He also felt that the Employer was required to grant leave for Union business.

The grievors needed, as part of their recognized roles as union officials, to attend the conference. As union officials, their postion would be jeopardized if they had yielded to what they believed to be violation of the contract. If they had stayed in Halifax, they would have abnegated their duty as union representatives with no remedy under the Collective Agreement. Grievance and arbitration would have been useless after the conference was over. Those circumstances justified an exception to the "obey now, grieve later" rule.

AUTHORITIES: Twin Oaks Memorial Hospital Local of the Nova Scotia Nurses' Union and Twin Oaks Memorial Hospital (unreported, August 30, 1982, Christie); Re DeHavilland Aircraft (1971) 23 L.A.C. 295 (Weatherill); Re St. Lawrence Seaway 20 L.A.C. (2d) 24 (Brown); Canadian National Railway and C.B.R.T. (case #632, unreported, Weatherill).

DECISION: 82-101

Canadian Paperworkers Union, Local 434 AND Masonite Canada Inc.

S. Bruce Outhouse, Chairman; John F. Kane and Roland Brunette

Ronald A. Pink, for the union
Guy Lemire, for the employer
October 27, 1982

DECISION: 82-101 (CONT'D)

ISSUE: Proprietary Rights to Overtime Assignments - Allocation of Overtime Within the Group 5:3224; Interpretation of Collective Agreements - The Collective Bargaining Context 4:2300

CIRCUMSTANCES: The grievor filed a grievance when he was not asked to work an overtime shift for which he was qualified and which he was willing to do. Instead, the overtime was worked by two employees of equal qualifications who would have preferred to have the time free. At issue was the interpretation of a clause in the Collective Agreement whcih stated that a temporary vacancy be filled by promoting a qualified employee in the same line of progression, or if one is not available by allocating the overtime among the employees holding the same job in which the vacancy existed.

AWARD: The Board found that the Employer was not under any obligation to offer the overtime to the grievor. Nothing in the language of the article imposed expressly or by reasonable inference the requirement that the Employer only give overtime to those willing to work.

DECISION: 82-102

Canadian Paperworkers Union, Local 434 AND Masonite Canada Inc.

S. Bruce Outhouse, Chairman; John F. Kane; Rolan Brunette

Ronald A. Pink, for the union
Guy Lemire, for the employer
October 29, 1982

ISSUE: Lay-off 6:2200; Seniority 6:2000; Bumping 6:2330; Management rights 5:0000; Collective Agreement - Company Rules 4:1500

CIRCUMSTANCES: The union grieved the laying-off of an employee with seniority, and the denial of his bumping rights. The employer shut its plant down for 12 weeks, which resulted in lay-offs. Major repairs were to be done on one of the presses and some men were kept on. The grievor, a general operator who had previously been a press operator, bumped a press operator and ran the press until an accident occurred with the press. There were no injuries to personnel nor damages to the machine, and the grievor was not held to be at fault. The employer decided to bring back a press operator to continue running the press and employed the grievor at other work. He was subsequently laid-off and when he tried to once again bump a junior employee, the employer refused to allow this and he was laid-off until the plant reopened. The union wanted compensation for the time lost by the grievor. The employer objected on three grounds: management rights, plant rules and the Industrial Safety Act. Finally, the collective agreement states that if press operators are retained during lay-offs, so must general operators.

DECISION: 82-102 (CONT'D)

AWARD: The grievance succeeds. The employers' claims of management rights and plant rules were rejected because the collective agreement precluded these with respect to lay-offs. The safety aspect was also dismissed because all general operators had been press operators and competent to operate the presses. The employer is to fully reimburse the grievor for lost pay and benefits while laid-off. Compensation is to be negotiated between the two parties.

DECISION: 82-103

Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927 AND Twin Cities Co-operative Dairy Limited.

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Deborah A. Carver, for the employer
November 15, 1982

ISSUE: Lay-off 6:2200; Seniority 6:2000; Bumping 6:2330

CIRCUMSTANCES: The grievance concerns compensation for wrongful lay-off. The grievor was laid-off from his job as ice cream driver-salesman and according to the collective agreement exercised his rights to bump a milk truck driver-safesman, a lower classification position. He worked at that job for 22 weeks at which time he regained his previous job as ice cream driver-salesman by switching jobs with a junior employee. The grievor should never have lost the higher classification job due to his seniority. During the 22 weeks as milk truck driver-salesman the grievor earned significantly less than he would have as an ice cream driver-salesman and asked for compensation for the appropriate amount. The employer felt that as they had guaranteed and paid him the same earnings in the lower classification job as he had made in the higher classification job just prior to the lay-off, he was not entitled to any compensation.

AWARD: The grievance succeeds. The grievor was wrongfully removed from his original job and thereby deprived of earnings he would have made. The amount of compensation is to be calculated and agreed to by both parties.

DECISION: 82-104

Canadian Airline Employees' Association AND Eastern Provincial Airways Ltd.

Innis Christie, Arbitrator

J. J. Nyman, for the union
Roy L. Heenan, for the employer
November 24, 1982

DECISION: 82-104 (CONT'D)

ISSUE: Discipline and discharge - Dishonesty 7:3300; Disciplinary Penalties - Mitigating Factors 7:4400.

CIRCUMSTANCES: The grievance involves the discharge of two employees from an airline company for misusing the travel pass. Employees have the option of reserving seats on flights and paying half-fare, or of flying free using their passes but with no guarantee of seats if the flight is sold out. The first grievor originally made reservations and cancelled them the morning of the flight after ascertaining there were vacant seats available; then she used her pass. The second grievor was discharged because his wife allegedly did the same, and the company held him responsible as she used his pass. The union considers discharge too severe a penalty in both cases, particularly with regard to the second grievor, and gave several examples of previous decisions where other forms of discipline were applied. The work record of the employees, as well as the financial hardship caused by the discharge to the second grievor, were considered.

AWARD: The grievance succeeds. The discharge for the first grievor is revoked and substituted with a one year suspension. The discharge for the second grievor is also revoked and because it was not proved he was personally involved, he is to be reinstated immediately, and the time from discharge to reinstatement is treated as a disciplinary suspension.

AUTHORITIES: Burley (1980); Phillips Cables Ltd. (1974), 6 L.A.C. (2d) 35, pp. 46-48; Steel Equipment Co. Limited (1964), 14 L.A.C. 356 (Reville); Brown and Beatty, Canadian Labour Arbitration. para. 7:4400; Herd (1980) (Kennedy); Fedosiewich (1981) (Brown); Miller (1979) (WeatherhIII); Warren (1980) (Brown); Prete (1977) (Andrews); Larose (1979) (Tremblay); Air Canada (1978), 17 L.A.C. (2d) 337.

DECISION: 82-105

Nova Scotia Government Employees Union AND the Board of Governors, College of Cape Breton

S. Bruce Outhouse, Chairman; Linda Gallant; Frank L. Elman, Q.C.

Ronald A. Pink, for the union
Bernard J. Boudreau, for the employer
November 12, 1982

ISSUE: Interpretation of collective agreement 4:2000

CIRCUMSTANCES: The grievance involves benefits to the grievor's daughter under the collective agreement. The employer offers full tuition benefits to children of its employees; the daughter was qualified to receive these benefits. She also received an entrance scholarship from the same institution. The employer then applied the entrance scholarship to the tuition fee and reduced the benefit under the collective agreement by an appropriate amount, covering the tuition costs. This was the usual practice of the employer in similar circumstances. The union argued

DECISION: 82-105 (CONT'D)

the collective agreement required the employer to pay full tuition benefits regardless of any other monies the student received. In response to an objection by the employer that the Board did not have jurisdiction to make an order with respect to payment of the scholarship, the Board was to decide only if the employer was in violation of the collective agreement.

AWARD: The grievance is allowed. The employer breached the collective agreement by not giving the full tuition benefits to the grievor's daughter.

DISSENT: (Elman) He felt that children of employees might be deprived of academic scholarships if the student also received full benefits.

DECISION: 82-106

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 927 AND Twin Cities Co-operative Dairy Limited

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Donald H. McDougall, Glen Dexter, for the employer
November 30, 1982

ISSUE: Discipline and Discharge - Standard of Proof; Criminal Misconduct 7:2500; Discipline and Discharge - Theft 7:3310

CIRCUMSTANCES: The grievance concerns discharge. The grievor was a driver-salesman operating a wholesale milk route which involved making deliveries to customers. A complaint from one of the stores about a discrepancy between volume of milk being delivered and the amount being charged for caused the employer to investigate the grievor. The employer concluded the grievor was cheating the customer and subsequently fired him. The grievor denied the allegations. The question of a higher standard of proof applying to criminal misconduct arose, and the arbitrator, citing several decisions, did not find this applicable.

AWARD: The grievance was dismissed. The arbitrator felt the evidence given by the employer was sufficient grounds for dismissal.

AUTHORITIES: Baxter v. Baxter (1959) 2 All E.R. 458. Fuel, Bus, Limousine, Petroleum Drivers & Allied Employees, Local 352, and Air Terminal Transport Ltd. (1970), 22 L.A.C. 143 (Brown). British Columbia Telephone Company and Telecommunication Workers' Union (1978), 18 L.A.C. (2d) 225 (J. Weiler). Dalton Cartage Company Limited v. The Continental Insurance Company and St. Paul Fire and Marine Insurance Company (1982), 40 N.R. 135.

DECISION: 82-107

International Brotherhood of Electrical Workers, Local 1030 AND Maritime Telegraph & Telephone Company Ltd.

Judge J. S. MacLellan, Arbitrator

Ronald A. Pink, for the union
Gregory I. North, for the employer
December 3, 1982

ISSUE: Discipline and Discharge - Fighting 7:3430; Disciplinary Penalties - Mitigating Factors 7:4400

CIRCUMSTANCES: The grievance concerns discharge. The grievor was discharged for assaulting another employee while on company time and on company premises. The union presented evidence that there was animosity between the two employees previous to the incident, and may have contributed to the altercation. The union showed that in similar circumstances other employees had not been discharged therefore the dismissal was excessive. The employer referred to dissatisfaction with the grievor's past employment record but part of this dissatisfaction was found to be the result of one foreman's personal dislike of the grievor and not due to any actions on the grievor's part, and could be excused.

AWARD: The grievance succeeds. While finding the employer had just cause for discipline, the arbitrator found dismissal too extreme for reasons presented by the union. He also felt the grievor showed remorse for his actions and that discharge would create economic hardship for him and his family. The dismissal was changed to a suspension lasting 13 weeks and the grievor was to be reinstated immediately with full back pay and benefits from the date following the 13 week suspension.

DECISION: 82-108

United Brotherhood of Carpenters and Joiners of America, Local 1392 AND MacDougall Construction Limited

F. B. William Kelly, Arbitrator

Ronald A. Pink, for the union
R. B. MacDonald, for the employer
December 6, 1982

ISSUE: Contracting-out 2:1424; Union Security - Damages 2:1426

CIRCUMSTANCES: The grievance is a union claim for monetary damages resulting from lost jobs through use of non-union personnel on a sub-contract. The employer sub-contracted a job and the sub-contractor did not use union members to do the work, which is contrary to the collective agreement. When a union representative discovered the situation he asked the employer to replace the non-union workers with union members, which the employer did. The union claimed it had members available to work during this time and wanted compensation for lost wages for the

DECISION: 82-108 (Cont'd)

work already completed. The employer disagreed with the union's position on several points; the estimate of how much work had been completed; that the union had employees available for work at that time; that monetary compensation would go to the union membership at large, including members not employed by the company and therefore not privy to the collective agreement. The collective agreement states that it is the employer's responsibility to inform sub-contractors that they must use union personnel, so the employer did not dispute that they had violated the agreement.

AWARD: The grievance succeeds. As the company submitted no evidence refuting the union's claims as to the amount of lost revenue for its members, the union's figures are accepted with the consideration that no union employee was caused to become unemployed as a result of the sub-contract. The employer was instructed to pay damages in accordance with the union's claims.

AUTHORITIES: Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), D.L.R. (3rd) 199 (Ont. C.A.). The National Association of Broadcast Employees and Technicians (N.A.B.E.T.) vs. New Brunswick Broadcasting Co. Limited (C.H.S.J. - TV, C.H.S.J. - Radio) (1982).

DECISION: 83-109

Amalgamated Transit Union, Local 508 AND Metropolitan Transit Commission

Judge J. A. MacLellan, Arbitrator

Ronald A. Pink, for the union
A. W. Cox, Q.C., Terry Roane, for the employer
December 10, 1982

ISSUE: Limit to Arbitration of Grievances - Death of Grievor 2:3110; Discharge Penalties - Employment Record 7:4428; Discipline and Discharge - Theft 7:3310; Time Limits 2:3128

CIRCUMSTANCES: The grievance concerns discharge of a driver who did not deposit a passenger's fare, but kept the money for himself. The driver died less than two months after the discharge and the union is asking for the discharge to be dismissed and death benefits paid to the driver's estate. The union gave evidence that the driver had not been asked to explain his actions to the employer, and that the driver had an unblemished record over a period of nearly 30 years and was close to retirement at the time of the incident. As such, the discharge was too severe a penalty. The employer raised two objections to the grievance itself: that it was out of time, and that it was not of a policy nature but personal to the grievor and therefore the union had no standing to continue. The arbitrator disagreed with the second objection and the union showed that it had followed the prescribed grievance procedure with regards to time limit.

DECISION: 82-109 (CONT'D)

AWARD: The grievance succeeds, the discharge is set aside and replaced by suspension. The decision was primarily based on the grievor's exemplory work record. His estate is entitled to death benefits as he would still be considered an employee of the Commission at the time of death.

AUTHORITIES: Canadian Labour Arbitration (Brown and Beatty) p. 72.; Collective Agreement Arbitration in Canada (Palmer) p. 140.

DECISION: 82-110

Canadian Union of Postal Workers AND Canada Post Corporation

.nnis Christie, Arbitrator

Ted Penney, D. H. Tingley, for the union
V.A. Pylypchuk, for the employer
December 2, 1982

ISSUE: Vacation and Other Benefits 8:3250; Extrinsic Evidence 3:4400; Collective Agreement - Intention of the Parties 4:2100; Part-time Employee 5:1124; Insurance and Welfare Plans - Entitlement to Benefits 8:3320

CIRCUMSTANCES: The question is whether part-time employees accumulate sick leave credits while on vacation leave. The union interprets the collective agreement as allowing this and the employer takes the opposite view. The arbitrator is first asked to rule on whether the clause in question is ambiguous so as to permit admittance of extrinsic evidence, and then to decide on the intent of the article. The clause was found to be ambiguous and evidence with respect to the negotiating history of the clause and the past practice of its administration was accepted. Prior to Feb. 1977 the collective agreement clearly stated that part-time employees accumulated sick leave benefits while on vacation, but this clause was eliminated from subsequent agreements. Since that time the employer has not included vacation time when calculating sick leave credits. The union argues it was not their intent during negotiations to take away that benefit, nor did they think the new clause (since Feb. 1977) implied that.

AWARD: The grievance is dismissed. The arbitrator agrees that the clause in question is ambiguous but after hearing the extrinsic evidence, decided that by removal of the clause which clearly gave part-time employees the right to accumulate sick leave credits while on vacation, the intent of the existing clause was to not allow this.

AUTHORITIES: Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Inc.) (1969), 3 D.L.R. (3rd) 161 (Ont. H.C.) p. 216.; Alliance Canners Ltd. (1978), 17 L.A.C. (2d) 270 (S.B. Linden, Chairman); Dalhousie Faculty Association and Dalhousie University (1982).

DECISION: 82-111

The Nova Scotia Government Employees Association AND Nova Scotia Civil Service Commission

Innis Christie, Arbitrator

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
December 3, 1982

ISSUE: Overtime 8:2100; Statutory Holiday 8:3130; Vacation Benefits 8:3120; Pension - Benefits 4:1400

CIRCUMSTANCES: The grievance is a continuation of one previously heard in January 1982, and involves compensation for overtime. The arbitrator originally found for the grievor and awarded damages. The employer sought judicial review of the award and the court found that the arbitrator had the jurisdiction to award damages. The matter is now whether the damages should include pay for a statutory holiday. The grievor was to be compensated for overtime worked during a 9 month period with straight time off with pay. On his retirement on May 11, 1981 he had accumulated enough overtime to remain on the payroll through and including July 1, 1981, a statutory holiday. The grievor had kept a record of his overtime and submitted the hours to the employer for compensation. The employer questioned the number of hours, but could not offer evidence that the grievor's claims were either incorrect or unreasonable.

AWARD: The grievance succeeds. The grievor was found to be a credible witness, and his evidence as to hours worked was accepted. He is awarded damages for the statutory holiday.

AUTHORITIES: Nova Scotia Civil Service Commission v. Nova Scotia Government Employees Union (1982, unreported).

DECISION: 82-112

United Food & Commercial Workers Union, Local 1973 AND Dominion Stores Limited

Gregory I. North, Chairman; Judge J. A. MacLellan, Chester Sanford

Ronald A. Pink, for the union
Peter J. MacKeigan, for the employer
December 13, 1982

ISSUE: Collective Agreement - Term and Termination 4:1620

CIRCUMSTANCES: The question is which of two collective agreements is in force. In 1981 the employer decided to change two of its Dominion Stores to discount stores and subsequently signed a new agreeement with employees in the two stores, which were called Thirft Stores. This meant employees previously covered by the Dominion

DECISION: 82-112 (CONT'D)

Stores agreement would now be covered by the Thrift Stores agreement. One of the Thrift Stores went out of business and the other changed its name to Best for Less. In 1982 another Dominion Store was changed to a Best For Less and the employer claims the Thrift Stores agreement applies to all Best For Less employees, and that it was their understanding at the time of negotiating the Thrift Stores agreement that all future discount stores would be covered by that agreement. The union contends this is not so, that they were told Thrift Stores belonged to a seperate legal company and as such the collective agreement could only apply to the two original Thrift Stores. The union did accept that the one store which changed from a Thrift Store to a Best For Less was still bound by the Thrift Store agreement.

AWARD: The grievance succeeds. The Thirft Stores agreement was meant to apply only to the original two discount stores and not supposed to be transferable to future discount operations. The Dominion Stores agreement is still in effect for all other stores.

DISSENT: (North) dissented as he considered the onus to be on the union to prove the Dominion Stores agreement is binding on Best For Less, which he doesn't think it did. As the union allowed that one of the original discount stores is still bound by the Thrift Stores agreement, all employees working in similar operations should also be bound by that agreement. He sees the principle of estoppel as being applicable in these circumstances.

AUTHORITIES: Canada Bread Co. (1970), 22 L.A.C. 98 (p. 105).

DECISION: 82-113

Canadian Union of Public Employees, Local 1431 AND Public Service Commission of Halifax

S. Bruce Outhouse, Chairman; Ronald J. Downie, Q.C., James Henley

Ray Hill, for the union
Peter Green, Q.C., for the employer
December 17, 1982

ISSUE: Interpretation of the Collective Agreement 4:2100; Pregnancy - Vacation Benefits 8:3250.

CIRCUMSTANCES: The grievance involves vacation benefits and the reduction of same due to maternity leave, and the interpretation of the collective agreement as it applies to this. Normally the grievor would receive 3 weeks vacation per year based on 1 1/4 days a month cumulation. The employer did not credit vacation time while the grievor was on maternity leave for 17 1/2 weeks and therefore she was given 14 days for 1981 and 11 1/2 days for 1982. The agreement is specific about the accumulation of seniority and sick leave benefits while on maternity leave but not about vacation benefits. The general section on vacations therefore applies to all employees. The employer interprets the article to mean vacation benefits

DECISION: 82-113 (CONT'D)

accrue according to actual working employment. The union argues it means time the grievor was a continuous employee and that the grievor continued to be an employee while on maternity leave.

AWARD: The grievance succeeds. As the collective agreement does not specify the accumulation of vacation benefits while on maternity leave, neither does it prohibit this and the Board decided the intent was not to deny these employees vacation benefits. The grievor is granted the full 3 weeks for both years.

DISSENT: (Downie) does not agree the collective agreement meant vacation benefits to accrue under these circumstances and that the past practice of the employer supports this. The agreement says that vacation benefits do accumulate during any paid leave of abscence and as maternity leave is not a paid leave, the intent was not to include it when caluclating vacation benefits.

AUTHORITIES: Air Canada and Canadian Airline Employees Association (1976), 13 L.A.C. (2d) 225 (Brown); Nurses Association and St. Mary's General Hospital Kitchener (1972), 24 L.A.C. 307 (O'Shea); Catholic Children's Adi Society of Metropolitan Toronto and Federation of Children's Aid Staffs (1975), 9 L.A.C. (2d) 374 (Linden); Falconbridge Nickel Mines Ltd. and United Steelworkers (1976), 11 L.A.C. (2d) 305 (Linden).

DECISION: 82-114

United Textile Workers' of America, Local 152, AND Dominion Textile Incorporated.

R. Lorne MacDougall, Q.C., Chairman; Donald H. MacDougall and A. Boyd MacGillivray

Waldo Clayton, for the union
Eric Durnford, for the employer
December 6, 1982

ISSUE: Employee Disability 7:3200; Inability to Discharge Employment Obligations 7:3220

CIRCUMSTANCES: The grievor had been discharged as he was unable to work due to a disability recieved several years before the discharge. During these three years he had seen several doctors and gone through various therepy programs. Whenever he returned to work he was unable to remain for more than short periods of time, ranging from a few days to a few months. The grievor submitted doctor's reports throughout and the employer allowed him to return each time he received medical assurance he could do so. Finally the grievor was unable to work for more than a couple of hours at a time and the employer discharged him on the grounds he was unable to fulfill his employment obligations. The grievor claimed that an article in the collective agreement prevents the employer from terminating him on these grounds, but the Arbitration Board found the article relevant only when considering seniority and did not apply in this instance.

DECISION: 82-114 (CONT'D)

AWARD: The grievance fails. The evidence showed it was unlikely the grievor would ever be able to return to work on a regular basis. The employer had been sympathetic with the grievor's problem throughout but finally discharged him, as was their right even though the grievor had just cause for his absenteeism.

AUTHORITIES: Niagara Structural Steel (St. Catherines) Ltd. and U.S.W., Local 7012, (1978), 18 L.A.C. (2d) 385 (O'Shea). Nova Scotia Government Employees Association and The Civil Service Commission of the Province of Nova Scotia (1979) (Clarke). Crouse-Hinds Canada Ltd. and United Automobile Workers (1981), 3 L.A.C. (3d) 230 (H.D. Brown).

DECISION: 82-115

United Food and Commercial Workers Union, Local 910 AND Basic Wholesale Foods (Port Hawkesbury, N.S.)

R. Lorne MacDougall, Q.C., Arbitrator

Ronald A. Pink, for the union
Donald H. McDougall, for the employer
December 30, 1982

ISSUE: Collective Agreement - Term and Termination 4:1620; Seniority - Lay-off 6:2200; Seniority - Bumping 6:2330

CIRCUMSTANCES: The grievance involves recall and seniority rights. The employer, having changed his grocery store from the usual type of retail operation to a discount "no-frills" type of store, laid-off a number of employees. The union claimed the collective agreement signed before the change is still in effect and therefore seniority should apply to any employees being kept on. This would mean recalling members now on lay-off and bumping junior employees still working. The question was whether the collective agreement still applies to the new discount operation.

AWARD: The union and the employer met before the hearing and worked out a settlement which was submitted to the arbitrator for approval, which was given. The two parties agreed that the collective agreement was still in force and senior employees are allowed to bump junior employees. The seniority of the membership of the local has been specified and recall will proceed accordingly. The union agreed to forego claims for damages.

DECISION: 82-116

Construction Association Management Labour Bureau Limited (Mersey Electrical & Mechanical Contracting Ltd.) AND International Brotherhood of Electrical Workers, Local 625.

R. Lorne MacDougall, Q.C., Arbitrator

Gerald McConnell, for the union
Eric Durnford, for the employer
December 30, 1982

ISSUE: Union Security 9:1200; Interpretation of the Collective Agreement 4:2000; Work Assignment - Contracting-out - Employees Outside Unit 5:1400

CIRCUMSTANCES: The employer is grieving the union's interpretation of hiring conditions set forth in the collective agreement. The agreement divides mainland Nova Scotia into 5 sections known as 'home' areas. This means if a contractor is located in Shelburne County, for example, that is his 'home' area as opposed to the other 4 sections. The first article dealing with hiring conditions states the union is to provide the contractor with suitable workers, i.e. the employer has no choice as to selection, he must take workers from the 'home' area. A second article states the employer has the option 'of bringing into the unit area one man of their choice from outside the affected area or to select one man from the available men in the area'. The employer interprets this to mean they have the right to select one man for each project regardless of whether it is in the 'home' area or not. The union disagrees. They interpret the first article as a union security clause. The second article deals with mobility of workers and refers to the area in which a job is located; an outside employer may bring a man into this area or select a worker from within the job area, but all other jobs must go to workers from within the area. To 'bring in a man' implies from outside the 'home' area. The employer says the second article does not specify 'outside' employers so it applies to all employers whether the job area is within their 'home' area or not. 'Bringing in' also implies having an employee from outside the 'home' area come in to work on a job within the 'home' area.

AWARD: The grievance fails. Why have two articles about the same subject unless it is to differentiate between two situations. In this case it is to specify the difference between workers within the 'home' area and those outside it. Employers have no choice about who works within the 'home' area, but may select one worker for jobs outside the area.

DECISION: 82-117

Canadian Union of Public Employees, Local 3010 AND The Children's Aid Society of Cape Breton

Charles O'Connel, Chairman; Tom Pickford and Robin Campbell

Gerald Yetman, for the union
Bernard Boudreau, for the employer
December 29, 1982

DECISION: 82-117 (CONT'D)

ISSUE: Job Classifications and Descriptions 5:2000, 5:2440

CIRCUMSTANCES: The grievor is objecting to the level of reclassification which resulted from her obtaining a Bachelor of Social Work. Prior to getting the degree she had 18 years experience in the field. The collective agreement does not specify how the experience of social workers who obtain a degree while already employed is to be considered with respect to reclassification. The employer's practice was to count experience attained after professional credentials as more valuable than that attained before. For every five years of experience before getting a degree, employees were granted one year of professional experience. This formula had been established with a previous employee up for reclassification. The grievor felt that as she had significantly more experience than that employee, she deserved more recognition for her long service and therefore a higher classification.

AWARD: The grievance fails. As the reclassification of employees who have obtained degrees while working is not specified in the collective agreement, management has the right to initiate its own formula for doing so. The Board does recommend that the employer reconsider the importance of the grievor's experience.

DISSENT: (Pickford) dissented on the basis of inconsistency by the employer in assigning value to experience for reclassification, particularly in the grievor's case where she will be doing basically the same job as before she received her degree.

PART 2

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PART 4

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